(1)

90-1003

NO. _____

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF SOUTH DAKOTA,

Petitioner,

v.

PETER SPOTTED HORSE, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF SOUTH DAKOTA

PETITION FOR WRIT OF CERTIORARI

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
State of South Dakota
Counsel of Record

John P. Guhin
Deputy Attorney General
500 East Capitol
Pierre, SD 57501-5070
Telephone: (605) 773-3215
Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE STATE OF SOUTH DAKOTA SUCCESSFULLY ASSUMED EXCLUSIVE PUBLIC LAW 280 JURISDICTION OVER INDIANS ON ROADS THROUGH INDIAN COUNTRY IN 1961, WHEN THE JURISDICTION IT TOOK WAS PARTIAL, CONSISTENT WITH WASHINGTON V. CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION?

II

WHETHER THE 1968 AMENDMENTS TO PUBLIC LAW 280, WHICH EXPLICITLY PRESERVED ANY "CESSION" OF JURISDICTION PREVIOUSLY MADE UNDER PUBLIC LAW 280, DEPRIVED THE STATE OF SOUTH DAKOTA OF THE JURISDICTION IT TOOK IN 1961?

PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

The Petitioner is the State of South Dakota. The Respondent is Peter A. Spotted Horse, Jr., the Defendant below. The Petitioner will be referred to as the "State." The Respondent will be referred to as "Respondent."

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JURISDICTIONAL STATEMENT

The opinion of the South Dakota Supreme Court was dated and entered October 4, 1990. This Petition is filed within 90 days of that date, and this Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Public Law 280, 67 Stat. 588, §§ 6 and 7 as enacted Aug. 15, 1953.

SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act. Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

SEC 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislation, obligate and bind the State to assumption thereof.

2. Act of Apr. 11, 1968, PL 90-284, Title IV, § 403, 82 Stat. 79, codified at 25 U.S.C. § 1323.

> (a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of title 18 of the United States Code, section 1360 of title 28 of the United States Code, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.
>
> (b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

3. S.D. SL 1961, ch. 464, §§ 1, 4 codified at SDCL 1-1-18; 1-1-21.

> SDCL 1-1-18. The state of South Dakota, in accordance with the provisions of 67 Statutes at Large, page 589 (Public Law 280), hereby assumes and accepts jurisdiction of all criminal offenses and civil causes of action arising in the Indian country located within this state, as Indian country is defined by Title 18 United States Code, section 1151, and obligates and binds this state to the assumption thereof, the provisions of chapter 106 of the Session Laws of the state of South Dakota for 1901, as amended, or any other law of this

> state to the contrary, notwithstanding.
>
> SDCL 1-1-21. Except as to criminal offenses and civil causes of action arising on any highways, as the term is defined in chapter 31-1, the jurisdiction provided for in § 1-1-18 shall not be deemed assumed or accepted by this state, and §§ 1-1-18 and 1-1-20 shall not be considered in effect, unless and until the Governor of the state of South Dakota, if satisfied that the United States of America has made proper provision for the reimbursement to this state and its counties for the added costs in connection with the assumption of said jurisdiction, has issued his proper proclamation duly filed with the secretary of state declaring the said jurisdiction to be assumed and accepted.

STATEMENT OF THE CASE

This case raises the issue of whether the South Dakota Supreme Court wrongly overturned a conviction of a tribal member for driving while intoxicated with a blood alcohol content of .224 percent, well over the statutory presumption level of .10 percent. The South Dakota Supreme Court

reasoned that, because, in the case at issue, a municipal police officer had pursued a tribal member onto the reservation, and, because in the Court's view, the State had no jurisdiction over tribal members on reservation highways, the tribal member's arrest was unconstitutional. This finding was entered despite the holding of the same court, just two years earlier, that the State did have jurisdiction over Indians on highways through Indian country. State v. Onihan, 427 N.W.2d 865 (S.D. 1988).

The Federal District Court had agreed with the earlier Onihan decision. Rosebud Sioux Tribe v. South Dakota, 709 F.Supp. 1502 (D.S.D. 1989). Nonetheless, the Eighth Circuit Court of Appeals disagreed, Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990), finding, inter alia, that a state could not, consistent with PL 280 as enacted in 1953, take partial, rather than

total, jurisdiction over a reservation. The state supreme court, because of the Eighth Circuit's decision, apparently believed that it was forced to find that the arrest of the tribal member within the reservation was unconstitutional, and that the blood alcohol evidence seized from him must also be suppressed.[1]

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[1]The chase had proceeded from Mobridge, South Dakota, a point off the reservation, to the Standing Rock Sioux Reservation, to a town on the reservation, "then into a housing area, and onto a private driveway or yard." State v. Spotted Horse, No. 16644, slip op. (S.D. S.Ct. Oct. 4, 1990) (Appendix, p. 4). The state supreme court did not hold, in the State's analysis, that the mere fact that the ultimate arrest was on a private driveway was decisive. The Court apparently accepted, in this regard, the State's argument that the highway jurisdiction, if it existed at all, extended to the driveway, at least in the context of the facts of this case. If the state supreme court had believed otherwise, it presumably would have had no occasion to overturn Onihan, for it could merely have held that the place at which the arrest was made was beyond the terms of the Onihan decision.

The State has filed a Petition for Certiorari regarding the Eighth Circuit case relied upon by the state supreme court, see South Dakota v. Rosebud Sioux Tribe, No. 90-749, petition for cert. filed November 5, 1990. This case is appropriately viewed as a companion case to that case.

With the foregoing as prologue, the State will now set out the legal framework of the underlying jurisdictional issue.

In 1953, Congress enacted Public Law 280, 67 Stat. 588 (codified in part at 18 U.S.C. § 1162 and 28 U.S.C. § 1360). The first five sections of this enactment effected a mandatory transfer of jurisdiction from the tribes and the federal government over Indian country to the five named states. Sections 6 and 7 of PL 280 constituted an offer to other states to accept civil and criminal jurisdiction over areas of Indian country within the other states. In 1957,

South Dakota made its first legislative response to the congressional offer of jurisdiction. See, S.D. SL 1957, ch. 319 (codified at SDCL 1-1-12 through 1-1-16). These statutes set forth a conditional acceptance of civil and criminal jurisdiction over Indian country, for it provided for a tribal referendum on the issue of acceptance of State jurisdiction by way of a referendum. All of the Tribes in South Dakota voted not to accept State jurisdiction within their reservations.

In 1959, the State Legislature enacted S.D. SL 1959, ch. 144 (formally codified at SDC 1960 Supp. § 65.08101). See SDCL 1-1-17. By this statute, the State assumed concurrent police jurisdiction over roads on the reservation which were jointly maintained or established with the United States. In 1961, the Legislature enacted the acceptance of PL 280 jurisdiction which is at issue in this

case. S.D. SL 1961, ch. 464, §§ 1, 4 (codified at SDCL 1-1-18 through 1-1-21). The State of South Dakota, by the 1961 Act, accepted jurisdiction over all "criminal offenses and civil causes of action arising on any highways." The acceptance also allowed the Governor to issue a proclamation assuming all other jurisdiction with Indian country, but only if the Governor was satisfied that the United States had made "proper provision for reimbursement to the State and its counties for the added cost in connection with the assumption of said jurisdiction . . . ." SDCL 1-1-21.

From 1961 to 1964, South Dakota did exercise criminal and civil jurisdiction over tribal members on highways in Indian country. In 1964, however, In re Hankins, 125 N.W.2d 839 (S.D. 1964), was decided. Hankins first found, correctly, that South Dakota's acceptance of PL 280 jurisdiction did not

require amendment of the South Dakota Constitution, but that acceptance of such jurisdiction could be accomplished by legislation. See South Dakota Constitution, art. XXII, XXVI; In re Hankins, 125 N.W.2d at 841.

The South Dakota Supreme Court also found that Congress intended South Dakota to fall within the provisions of Section 6 of PL 280. In re Hankins, 125 N.W.2d at 842. Further, the Court found that Section 7 did not apply to South Dakota, and that Congress did not authorize states to assume only partial jurisdiction in Indian country. In re Hankins, 125 N.W.2d at 842-843. These findings were erroneous, as established by this Court in Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 494-499 (1979).

In 1963, the Legislature enacted another statute, which took full, unconditional

jurisdiction over all Indian country. See S.D. SL 1963, ch. 467; the statute, however, was referred to the voters, defeated and thus never became effective.

In 1968, Congress enacted, as an amendment to the controversial Civil Rights Act of 1968, amendments to PL 280, which were known as the Indian Civil Rights Act of 1968. 25 U.S.C. § 1323(b) provided that Section 7, the provision of PL 280 which allowed for unilateral assumption of jurisdiction by the states, was hereby repealed; the same section also explicitly provided that the repeal "shall not affect any cession of jurisdiction made pursuant to said section prior to its repeal."

As noted above, in 1988 the South Dakota Supreme Court decided State v. Onihan, 427 N.W.2d 865 (S.D. 1988), which, relying on Yakima, implicitly overruled Hankins, and specifically determined that South Dakota had

successfully taken jurisdiction over Indians on highways in Indian country in 1961 and retained that jurisdiction to the present. A federal district court found in a parallel action that the state supreme court had correctly found the existence of State jurisdiction, Rosebud Sioux Tribe v. South Dakota, 709 F.Supp. 1502 (D.S.D. 1989), but the Eighth Circuit Court of Appeals reversed in Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990). This decision is presently before the Court on a Petition for Writ of Certiorari. See South Dakota v. Rosebud Sioux Tribe, No. 90-749, petition for cert. filed November 5, 1990.

Based upon the Rosebud decision of the Eighth Circuit Court of Appeals, the South Dakota Supreme Court reversed its decision in Onihan in the present litigation. In State v. Spotted Horse, No. 16644, slip op. (S.D. S.Ct. Sept. 4, 1990) (Appendix), the South

Dakota Supreme Court relied entirely upon the decision of the Eighth Circuit Court of Appeals in the Rosebud case. Indeed, its discussion of the critical jurisdictional issue is composed almost entirely of two quotations from the Rosebud case. The South Dakota court thus held that the State "did not have jurisdiction over Indian country, nor may the State exercise partial jurisdiction over highways running through the reservations." Spotted Horse, slip op. (Appendix, p. 15).

The South Dakota Supreme Court goes on to suppress the admission of a blood test taken from the Respondent on the reservation because the state officer who took it was beyond his jurisdiction under Rosebud. The court found that the evidence was taken pursuant to an unconstitutional arrest and therefore was not admissible against the Respondent. Therefore, the blood test, which

showed a blood alcohol content of Defendant Spotted Horse of .244 percent, was suppressed and his conviction for driving while intoxicated was reversed.

REASONS FOR GRANTING THE WRIT

THE SOUTH DAKOTA SUPREME COURT HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. Introduction.

In 1961, the South Dakota Legislature assumed jurisdiction over Indians on highways through Indian country, S.D. SL 1961, ch. 464, §§ 1, 4, and the State exercised such jurisdiction until 1964 when its own supreme court decided that, as a matter of federal law, a state could not take partial jurisdiction over Indian reservations. In re Hankins, 125 N.W.2d 839 (S.D. 1964).

This Court, in 1979, however, in Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463

(1979), determined that a state could, consistent with PL 280, assume partial jurisdiction.

The importance of this case lies not only in the misapplication of this Court's Yakima opinion, and other opinions of this Court detailed below, but in the tangible result depriving South Dakota of jurisdiction.

In particular, because South Dakota has been wrongfully deprived of jurisdiction, South Dakota's Indian reservations have a highway fatality rate far beyond that of other state highways. For example, the ten-year averages show that Todd County, on the Rosebud Sioux Reservation, has a highway fatality rate three times that of the state average; Shannon County, on the Pine Ridge Reservation, has a fatality rate in excess of

five times the state average.[2] The exercise of law enforcement authority by the State on roads through the Indian reservations could, and the State believes would, have the effect of substantially lowering the fatality rate on Indian reservations to a level more consistent with that of the remainder of the State.

Finally, the opinions of the state supreme court and the Eighth Circuit clearly put at issue not only South Dakota's pre-1968 assumption of partial jurisdiction, but also that of Arizona, see Ariz. Rev. Stat. Ann. § 49-561 (air pollution only--water pollution repealed--no offer of total jurisdiction);

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[2]Affidavit of Pat Winters, dated Jan. 6, 1988. The State has cited evidence from South Dakota v. Rosebud Sioux Tribe, No. 90-479, petition for cert. filed November 5, 1990, because of the state supreme court's heavy reliance on that case, both in fact and law.

Montana, see Mont. Code Ann. §§ 2-1-301, 2-1-302 (criminal jurisdic-tion only over Flathead Reservation--county veto of full jurisdiction); and Iowa, see Iowa Code Ann. § 1.12-1.14 (civil only over Sac and Fox Indian settlement--no total jurisdiction offered).

B. The South Dakota Supreme Court, through reliance on the erroneous decision of the Eighth Circuit Court of Appeals in Rosebud Sioux Tribe v. South Dakota, misconstrued this Court's opinion in Washington v. Confederated Bands & Tribes of the Yakima Indian Nation when it found that the State of South Dakota did not, in 1961, successfully assume jurisdiction only over highways under PL 280 as enacted in 1953.

In 1953, Congress modified the existing federal/state/tribal jurisdictional arrangements to allow states to unilaterally assume jurisdiction over Indians within Indian country. See Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, codified in part at 18 U.S.C. § 1162 (1988) (PL 280).

Section 7 of PL 280 provided that the State could:

> assume jurisdiction at such time and in such manner as the people of the state shall, by affirmative legislation, obligate and bind the state to assumption thereof.

This Court, in 1979, decided Yakima. As the Eighth Circuit stated correctly:

> Yakima ruled that the Washington jurisdiction statute validly assumed partial jurisdiction under the pre-1968 version of P.L. 280.

Rosebud Sioux Tribe, 900 F.2d at 1168 (emphasis added.)

Washington had assumed jurisdiction over highways through Indian country (the matter at issue here) and in addition, over compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings and dependent children, but had not assumed total jurisdiction. Yakima, 439 U.S. at 465 n.1. The Washington statute

provided that the state would take total jurisdiction should the Tribe request. The Washington tribes did not request the state to take jurisdiction and, in fact, resisted the assumption of any jurisdiction by the state.

This Court in Yakima rejected the narrow view of the lower courts with regard to the partial assumption of PL 280 jurisdiction, stating:

> [T]he drafters [of PL 280] were primarily concerned with establishing a general transfer scheme that would facilitate, not impede, future action by other states willing to accept jurisdiction. It is clear that the all-or-nothing approach suggested by the tribe would impede even the most responsible and sensitive jurisdictional arrangements designed by the states.

Yakima, 439 U.S. at 497 (emphasis added).

Notwithstanding the clear direction of this Court in Yakima, the South Dakota Supreme Court, in its reliance on the Rosebud

decision of the court of appeals, erroneously concluded that South Dakota could not assume partial jurisdiction, that is, jurisdiction over Indians on highways through Indian country only, through PL 280, by way of its own statute enacted in 1961. See SDCL 1-1-21, set out above.

The analysis of the South Dakota Supreme Court supporting its view is cursory indeed, in that it merely quotes four paragraphs from the decision of the Rosebud court to find that the South Dakota legislation in 1961 had not validly taken jurisdiction within the terms of PL 280.

The South Dakota Supreme Court, following Rosebud, identified the major concerns of Yakima motivating the passage of PL 280 as:

> (1) to reduce the economic burden of federal jurisdiction over reservations, (2) to respond to a perceived hiatus in law enforcement on reservations, and (3) to

> assimilate Indians into the general population.

Yakima, 439 U.S. at 498, quoted at Rosebud Sioux Tribe v. South Dakota, 900 F.2d at 1170-71, quoted at State v. Spotted Horse, slip op. (Appendix, p. 13).

The South Dakota Supreme Court then, through further quotation of Rosebud, found that the assumption of jurisdiction over highways in South Dakota did little to "reduce the economic burden of federal jurisdiction over reservations since the federal government retains the financial burden of the majority of jurisdictional concerns." Spotted Horse, slip op. (Appendix, pp. 13-14) (quoting Rosebud Sioux Tribe, 900 F.2d at 1171). This conclusion is not correct.

The ending of federal jurisdiction over highways means, of course, that vehicular homicide, manslaughter and similar

prosecutions would not have to be undertaken by the United States Attorney, the federal courts would not be burdened with such cases, and federal prisons would not be burdened with these prisoners. Likewise, the substantial federal subsidy of tribal police departments to undertake jurisdiction of traffic offenses involving tribal members will not have to occur.[3]

The South Dakota Supreme Court, again through quotation of the decision by the court of appeals, also found that the State's assumption of partial jurisdiction did not "respond to a perceived hiatus in law

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[3]The federal subsidy of tribal police departments alone for traffic enforcement by three of the four Plaintiff Tribes is estimated at approximately $850,000. (Estimate of the State drawn from Answers to Interrogatories of three of four Plaintiff Tribes in Rosebud Sioux Tribe v. South Dakota.)

enforcement," the second Yakima factor, in that it did not "go very far in reducing lawlessness on reservations, but simply introduced a third party to the "already complex jurisdiction pattern on reservations." Spotted Horse, slip op. (Appendix, p. 13) (quoting Rosebud Sioux Tribe, 900 F.2d at 1170).

This finding is neither helpful nor correct. Except for matters involving juvenile delinquency, the State of Washington took no more criminal jurisdiction than did South Dakota, yet this Court had no hesitation about finding its action consistent with PL 280 in Yakima.

Furthermore, the exercise of jurisdiction over Indians on roads through the reservations will, in fact, go a great distance toward reducing lawlessness, especially lawlessness which creates great danger to Indians and non-Indians alike. As

set forth above, the fatality rate for the reservation roads is two to five times the state average as evidenced by the analysis of ten years of statistics. See Affidavit of Pat Winters.

In addition, South Dakota does not seek to introduce a "third party" to the reservation roads. As the Courts below must understand, South Dakota possesses and will continue to possess jurisdiction over non-Indians for certain offenses on the roads through reservations, regardless of the outcome of this litigation. See Solem v. Bartlett, 465 U.S. 463, 465 (1984); United States v. McBratney, 104 U.S. 621 (1892). (As to non-member Indians, see Duro v. Reina, ___ U.S. ___, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990); H.R. 5803, Defense Appropriations Act of 1991.) By approving South Dakota's assumption of jurisdiction on roads through reservations, the role of the second and

third parties, i.e., the federal government and the Tribes, will be eliminated.

It should also be noted that Yakima indicated that a reservation-by-reservation analysis was unnecessary to establish that a particular state's action in assuming law enforcement responsibility did "respond to a perceived hiatus in law enforcement." In particular, this Court's analysis indicated that there was no need to deal with the federal and tribal assertion that, because the Yakima Tribe itself might be capable of providing law enforcement, Washington could not assume law enforcement functions. See Yakima, 439 U.S. at 489 n.33.

Further, this Court implicitly found that the determination favoring state law enforcement had been made by Congress:

> State jurisdiction is complete as to all non-Indians on reservations and is also complete as to Indians on non-trust lands. The law enforcement hiatus that preoccupied

> the 83d Congress has to that extent been eliminated.

Yakima, 439 U.S. at 498.

The same is true of the State of South Dakota. The law enforcement hiatus that preoccupied the 83d Congress has been eliminated to the extent to which South Dakota takes jurisdiction over all persons on highways through the reservations.

The South Dakota Supreme Court, through its quotation of the decision of the Eighth Circuit Court of Appeals, apparently did agree that South Dakota's assumption of highway jurisdiction responded to the third concern of Yakima to "assimilate Indians to the general population." Spotted Horse, slip op. (Appendix, p. 13) (quoting Rosebud Sioux Tribe, 900 F.2d at 1170).

Indeed, South Dakota's assumption of jurisdiction was much less intrusive than that of Washington. Washington inserted

itself into, for example, domestic relations and juvenile delinquency, adoption proceedings and dependent children, even though these concerns are at the heart of Indian culture. See, e.g., Indian Child Welfare Act, 1978, 25 U.S.C. § 1901-1963; Mississippi Bands of Choctaw Indians v. Holyfield, ___ U.S. ___, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). South Dakota refrained from taking such actions. Thus, the concerns of Yakima regarding the purposes of PL 280 were all easily met in terms of the Yakima case itself.

The South Dakota Supreme Court, through quotation of the Rosebud decision, also objected to South Dakota's assumption of jurisdiction because South Dakota did not simultaneously offer to take total jurisdiction over all Indian country and all Indians as did Washington. The court apparently ignored the fact that South

Dakota, just four years before the 1961 assumption of partial jurisdiction, had allowed each of the Tribes to veto any assumption of state jurisdiction under a previous PL 280 enactment, see S.D. SL 1957, ch. 319, and that all the Tribes did exercise just such a veto. The functional equivalent of the Washington arrangement was surely achieved. The state supreme court, therefore, takes a mechanistic view of this Court's decision in Yakima, apparently believing that only an arrangement which precisely follows Washington's is satisfactory. What this Court found, of course, was that there would be "responsible and sensitive jurisdictional arrangements designed by the states." Yakima, 439 U.S. at 497 (emphasis added). This clearly leaves the door open for arrangements other than those designed by the State of Washington.

In sum, the South Dakota Supreme Court, by blindly adopting the Eighth Circuit Court of Appeals, has put itself in direct conflict with Washington v. Yakima Indian Nation.

C. The state supreme court wrongly determined, in effect, that the State could, prior to 1968, retrocede jurisdiction to the Tribe and federal government by means of an erroneous state court decision.

As noted above, the South Dakota Legislature in 1961 assumed jurisdiction over Indians on highways through Indian country.

In 1964, the South Dakota Supreme Court, misreading federal law, determined that a state legislature could not take partial jurisdiction over Indian country. In re Hankins, 125 N.W.2d 839 (S.D. 1964). The state court Hankins decision was, in the State's view, proven wrong in Yakima in 1979. Nonetheless the state Spotted Horse opinion has implicitly, through the erroneous Rosebud decision, allowed the erroneous state court

Hankins decision to control an important question of federal law, rather than the later definitive decision of this Court in Yakima.

In Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 886 (1986), this Court said:

> As originally enacted, Pub. L. 280 plainly contemplated that, if States chose to extend state court jurisdiction over causes of action arising in Indian country, they would be required to honor that commitment, for the Act made no provision for States to return any jurisdiction to the United States. [Emphasis added.]

Thus, South Dakota could not have deliberately surrendered jurisdiction to the United States prior to the enactment of the 1968 amendments because there was no provision in the existing law to allow this action.

If South Dakota was not able, as a matter of federal law, to intentionally,

through legislation, abandon highway jurisdiction, such a result could certainly not occur by virtue of an erroneous state supreme court decision such as occurred in Hankins.[4]

In sum, the decision of the state supreme court at issue here through reliance on the erroneous federal Rosebud decision, disregards both the principal of stare decisis and the intent and effect of the supremacy clause of the United States constitution.

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[4]Of course, in 1968, Congress did provide, for the first time, for a mechanism for retrocession and for acceptance of retrocession. 25 U.S.C. § 1323(b). There is no claim of retrocession under this law; indeed, the Tribes have disclaimed any such argument.

D. The South Dakota Supreme Court misconstrued the retroactivity decisions of this Court and thus disrupted the uniform application of federal law on a permanent basis.

The "usual rule" is that decisions of this Court on federal law issues are retroactive. See Goodman v. Lukens Steel Co., 482 U.S. 656, 662 (1987).

Departures from this rule are appropriately countenanced only to protect private rights. Thus, for example, in Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), this Court held that a determination of a statute's unconstitutionality would not be applied retroactively so as to deprive bond holders of their rights. At the same time, the ultimate decision regarding unconstitutionality of the statute was not itself affected. See also Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

The clear direction of this Court, the State suggests, is set out in United States

v. Estate of Donnelly, 397 U.S. 286, 294 (1970), in which this Court stated:

> Acts of Congress are generally to be applied uniformly throughout the country from the date of their effectiveness onward. . . . Deviant rulings by circuit courts of appeals [and, the State suggests, state supreme courts] cannot generally provide the 'justified reliance' necessary to warrant withholding retroapplication of a decision construing a statute as Congress intended it. In rare cases, decisions construing federal statutes might be denied full retroactivity, as for instance when this Court overrules its own construction of a statute . . .

See also Chesapeake and Ohio Railway Co. v. Martin, 283 U.S. 209 (1931).

Despite this direction, the South Dakota Supreme Court nonetheless, through citation of the court of appeals' decision, refused to apply this Court's decision in Washington v. Yakima Indian Nation, supra, retroactively. In essence, the South Dakota Supreme Court has allowed its own erroneous decision in Hankins in 1964 to permanently set federal

law in South Dakota contrary to this Court's decision in Yakima in 1979. This action (1) disrupts the uniform application of federal law, and (2) does so on a permanent basis, thus finally and erroneously allocating power between the states and the tribes.

It is difficult to ascertain precisely the reasoning of the South Dakota Supreme Court since its decision on the matter of jurisdiction quoted only a few paragraphs from the court of appeals' decision in Rosebud. Spotted Horse, slip op. (Appendix, pp. 13-15). Presumably, however, the South Dakota Supreme Court, following the Eighth Circuit Court of Appeals, believed that it was appropriate to refuse to grant retroactivity to Yakima because to do so would disturb the "vested rights" of the parties, would frustrate the "justifiable expectations of the parties," and further, it would be "inequitable" to do so. See

generally Rosebud Sioux Tribe v. South Dakota, 900 F.2d at 1172-1173.

Of course, the only vested right at issue is that of the State of South Dakota. As noted above, Congress in 1968 amended PL 280 to require tribal consent to any future assumption of jurisdiction by the states. In so doing, however, Congress explicitly preserved "cessions" of jurisdiction already made to the states. The 1968 amendment flatly states that repeal of the relevant sections of PL 280:

> shall not affect any cession of jurisdiction made pursuant to said section prior to its repeal.

Act of Apr. 11, 1968, 82 Stat. 73, 79 (codified at 25 U.S.C. § 1323(b)).

The language of the Act is clear and unmistakable. If a "cession" had been made prior to the Act, it was preserved.

In South Dakota's case, the "cession" had been accomplished by the federal

government to the State in 1961 when the State Legislature adopted S.D. SL 1961, ch. 464, which was effective on July 1, 1961. This act of cession was, therefore, on the face of 25 U.S.C. § 1323(b), preserved, or in other words, "vested." Moreover, because the language of the statute is plain and definitively establishes the appropriate result in this case, the Courts below erred in virtually ignoring that language, contrary to the decisions of this Court indicating the need for great caution in the use of legislative history. See, e.g., Pension Benefit Guarantee Corp. v. LTV Corp., 496 U.S. ___, 110 S.Ct. 2668, 2677-2678, 110 L.Ed.2d 579, 596-597 (1990); Burlington Northern Railroad Co. v. Oklahoma Tax Comm., 481 U.S. 454, 461 (1987). Caminetti v. United States, 243 U.S. 470, 485 (1917). Heavy reliance on the legislative history of the 1968 legislation is particularly

troubling in light of this Court's statement in Yakima that:

> We do not rely on the 1968 legislation or its history, finding the latter equivocal, and mindful that the issues in this case are to be determined in accord with legislation enacted in 1953.

Yakima, 439 U.S. at 493, n.40.

In any event, the grounds for the purported "vested right" of the Tribes are exceedingly vague. The Eighth Circuit's opinion admits that there is "no vested right to a judicial decision." Rosebud Sioux Tribe, 900 F.2d at 1173 (citing United States v. Estate of Donnelly, 397 U.S. 286, 295 (1970)). This is especially true, the State submits, when the claimed "vesting" is bottomed upon an erroneous judicial decision, such as the Hankins decision.

While paying "lip service" to the notion that the supposed "vested right" of the Tribes cannot flow from the erroneous Hankins

decision, the circuit court, and presumably the state supreme court, nonetheless appear to adopt the view that such a right flows "from the change in Congress' offer of jurisdiction to the states." Rosebud Sioux Tribe, 900 F.2d at 1173. This surely is bootstrapping of major proportion. All agree that tribal rights cannot "vest" or arise from the Hankins decision. The 1968 Congressional Act is clear on its face. But in the mind of the Eighth Circuit, blindly followed by the South Dakota Supreme Court, the foregoing negative facts bring forth a positive conclusion--and a vested tribal right to the status quo is born.

Moreover, contrary to the view of the court of appeals (and, again, presumably the state supreme court), the Tribes do not have a "justifiable expectation" protectable by federal law in the erroneous decision of the South Dakota Supreme Court in Hankins. It

will be recalled that Hankins was decided in 1964. The Yakima case was decided in 1979. The very next year, South Dakota argued the applicability of Yakima in a case which was ultimately decided upon a different issue.

Whatever the "justifiable expectation" doctrine is, it does not protect expectations built up over a mere fifteen-year period in which a state government merely declines to defy the courts. (Contrast the seventy-year period relied upon in Rosebud Sioux Tribe v. Kneip, 439 U.S. 584 (1977).)

The South Dakota Supreme Court, relying on Rosebud, further appeared to argue that it was not proper to disrupt the ongoing relationship between the tribes and the states, Spotted Horse, slip op. (Appendix, p. 15) (quoting Rosebud, 900 F.2d at 1173), and that it was not "equitable" to give this Court's Yakima decision retroactive effect. See Rosebud Sioux Tribe, 900 F.2d at 1173.

The decisive point with regard to that ongoing relationship is that the fatality rate on reservation highways far exceeds that on non-reservation highways in the State. The ten-year fatality rate in Todd County of the Rosebud Reservation is over three times the state average; the ten-year fatality rate in Shannon County of the Pine Ridge Reservation is over the five times the state average. (Affidavit of Pat Winters, dated Jan. 6, 1988, in Rosebud Sioux Tribe v. South Dakota.)

Likewise, in examining the equity equation it should be remembered that the jurisdiction taken by the State was limited. Only jurisdiction over highways was taken. The jurisdiction taken does not go to the heart of the tribal culture or way of life, but rather provides protection for Indians and non-Indians alike on reservation highways. The opinion of the state supreme

court appears to take the view that any assumption of jurisdiction is crippling to the Tribes, a stance clearly not supported by any evidence nor by-Yakima itself. Surely it is not "inequitable" to give retroactive application to the decisions of this Court to provide for the safety of roads on the reservations, while preserving the heart of Indian culture and way of life.

The State submits that this Court should review the failure of the South Dakota Supreme Court grant retroactivity to this Court's decision in Yakima.

CONCLUSION

This Court, in the Yakima case, found that a state could assume partial jurisdiction over Indian country, and, in particular, that a state could assume jurisdiction over Indians on highways through Indian reservations. The South Dakota Supreme Court, relying heavily on a decision

of the Eighth Circuit Court of Appeals in a case now before this Court, has declined to give retroactive effect to that decision, and, in effect, has declared that the erroneous Hankins decision of the state supreme court in 1964 sets the boundaries of federal law and permanently allocates powers between the Tribes and the State, despite the intervening and controlling decision of this Court in Yakima. In so doing, it has prevented South Dakota from taking appropriate action to deal with the tragic fatality rate on the highways of South Dakota's Indian reservations; indeed in this very case the effective prosecution of a person having a .224 percent blood alcohol content was prevented. This case thus presents an important question of federal-tribal-state relations and of the public safety and should be addressed here. The State of South Dakota respectfully requests

that this Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL
Counsel of record

APPENDIX

#16644-aff. in pt., rev. & rem. in pt.-REM

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

STATE OF SOUTH DAKOTA, Plaintiff and Appellee,

v.

PETER SPOTTED HORSE, JR., Defendant and Appellant.

* * * *

APPEAL FROM THE CIRCUIT COURT OF THE
FIFTH JUDICIAL CIRCUIT
WALWORTH COUNTY, SOUTH DAKOTA

* * * *

HONORABLE LELAND J. BERNDT
Judge

* * * *

JOHN P. GUHIN
Deputy Attorney General
Pierre, South Dakota

On the brief:
ROGER A. TELLINGHUISEN
Attorney General
Pierre, South Dakota

Attorneys for plaintiff, and appellee.

RANDOLPH J. SEILER of
SEILER & CAIN
Mobridge, South Dakota

Attorneys for defendant and appellant.

* * * *

ARGUED January 9, 1990
OPINION FILED Oct 04 1990

MORGAN, Justice

Peter Spotted Horse, Jr. (Spotted Horse) appeals[1] a judgment rendered on a jury verdict convicting him of driving while under the influence of an alcoholic beverage (DUI) and failure to display current registration. We affirm in part and reverse and remand in part.

FACTS

On April 1, 1988, Spotted Horse, an enrolled member of the Standing Rock Sioux Tribe who resided on the reservation, was driving off the reservation in the town of Mobridge, South Dakota. His car was not displaying valid 1988 license plate stickers, in violation of SDCL 32-5-98 (a Class 2 misdemeanor). Seeing this violation,

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[1]The Standing Rock Sioux Tribe filed an amicus curiae brief in support of Spotted Horse.

Mobridge City Police Officer Roger Krone (Krone) attempted to stop the vehicle by turning on the red revolving light on top of his patrol car. This attempted stop occurred within the boundaries of the municipality of Mobridge.

Spotted Horse did not stop. Instead, he drove across the Missouri River bridge and onto the Standing Rock Sioux Reservation (reservation). Krone continued the pursuit with his siren running and red light flashing. The chase reached speeds ranging from 90 mph to 109 mph.[2] Spotted Horse

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[2]Justice Dunn, concurring specially in State v. Seidschlaw, 304 N.W.2d 102, 107-08 (S.D. 1981), expressed well our opinion about these high-speed chases over minor traffic offenses.

> "I realize that in the presence of a violation of the law it is the duty of an officer to take steps to suppress the offense and apprehend the violator; however, this must be done within the

(Footnote Continued)

proceeded north on Highway 1806, driving seven or eight miles onto the reservation. Spotted Horse then turned off of Highway 1806 and drove within the city limits of the town of Wakpala, then into a housing area, and onto a private driveway or yard. Krone continued following Spotted Horse the entire time, never losing sight of him.

Once Krone exited his police car, Spotted Horse began to drive away again. Krone ran to the vehicle, reached inside and shut off the ignition. There were two adults and two children in the car. Krone informed Spotted Horse that he did not have "current [license] plates" on his car and told him numerous times to get out of the car.

(Footnote Continued)

> limits of rationality. Here the acts of these officers has brought them to the very edge of this precipice of rationality and may even have plunged them over that edge."

Spotted Horse refused. Krone started pulling on Spotted Horse's arm to extract him from the car. The ensuing struggle went on for anywhere from five to fifteen minutes during which time Krone struck Spotted Horse three or four times with his nightstick, several of the blows hitting Spotted Horse in the head and cheek. Finally, Krone pulled Spotted Horse from the car by his hair or his left shoulder and upper arm, threw him to the ground on his stomach, put his knee on his back and handcuffed him. Following the handcuffing, Krone lifted Spotted Horse by the arms and placed him in the police car.

Spotted Horse was then taken back to Mobridge. On the ride back, Krone noticed the smell of alcohol on Spotted Horse's breath. After arriving back at the station in Mobridge, Krone administered the field sobriety test to Spotted Horse, which he failed. Following the test, Krone arrested

Spotted Horse for DUI and read him the implied consent warnings. Spotted Horse agreed to take a blood test and was taken to the Mobridge Hospital for the extraction of blood. The BAC was 0.244.

Spotted Horse was charged with five counts: (1) eluding police in violation of SDCL 32-33-18 (Class 1 misdemeanor); (2) driving while under the influence in violation of SDCL 32-23-1 (Class 1 misdemeanor); (3) resisting arrest in violation of SDCL 22-11-4 (Class 1 misdemeanor); (4) driving without a license in violation of SDCL 32-12-22 (Class 2 misdemeanor); and (5) failure to display current registration in violation of SDCL 32-5-98 (Class 2 misdemeanor). After a jury trial, Spotted Horse was convicted of Counts 2 and 5, driving under the influence and failure to display current registration. He was acquitted of

Counts 1 and 3, eluding police and resisting arrest.[3]

ISSUES

1. Did the trial court err in ruling that the State had jurisdiction to try an Indian who committed a misdemeanor off the reservation, but who fled to the reservation and was arrested by a municipal police officer on the reservation?

2. Did the trial court abuse its discretion in not suppressing evidence of unrelated crimes where the defendant alleged use of excessive force in making the arrest?

3. Did the trial court abuse its discretion in failing to suppress the blood test given to defendant because the blood was extracted by an LPN with expanded training?

ANALYSIS

We begin by discussing the appropriate standard of review. The jurisdictional challenge raised by this appeal involves the

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[3]The fourth charge, driving without a license, was dismissed during trial.

application and effect of SDCL 1-1-18 and 1-1-21, and procedural compliance with Public Law 280. Because issues regarding the removal of constitutional disclaimers of state jurisdiction are questions of state law, they are reviewed de novo by this court. See Brown v. Egan Consol. School Dist. #50-2, 449 N.W.2d 259 (S.D. 1989); Beville v. University of S.D. Bd. of Regents, 420 N.W.2d 9 (S.D. 1988). However, the question of substantive compliance with PL 280, i.e., the validity of retrocession of PL 280 jurisdiction, is a question of federal law. Tyndall v. Gunter, 840 F.2d 617, 618 (8th Cir. 1988). With these standards in mind, we begin with Spotted Horse's argument that State lacked jurisdiction to make arrests on the reservation.

1. Jurisdiction

To understand our ultimate conclusion, it is necessary to briefly retrace the

intermittent nature of state jurisdiction over reservations. In 1953, Congress passed Public Law 280,[4] which gave disclaimer[5] states, such as South Dakota, statutory power to assume and exercise civil and criminal jurisdiction over reservations if they passed legislation to accept jurisdiction. State v. Onihan, 427 N.W.2d 365, 367 (S.D. 1988). Though South Dakota made efforts to pass legislation in 1957 and 1959 to fulfill this mandate, the legislation was ultimately ineffective. See In re High Pine, 78 S.D. 121, 99 N.W.2d 38 (1959); 1951 S.D. Sess. L.

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[4]Act of August 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1976)).

[5]The term "disclaimer state" designates those states which had constitutions or statutes containing organic law disclaimers of jurisdiction over Indian country. State v. Onihan, 427 N.W.2d 365, 367 (S.D. 1988).

ch. 187; 1957 S.D. Sess. L. ch. 319; 1959 S.D. Sess. L. ch. 144, §§ 1,2.

Then, in 1961, South Dakota passed SDCL 1-1-18[6] and SDCL 1-1-21,[7] wherein the

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[6]1961 S.D. Sess. L. ch. 464, § 1. SDCL 1-1-18 provides:

> The state of South Dakota, in accordance with the provisions of 67 Statutes at Large, page 589 (Public Law 280), hereby assumes and accepts jurisdiction of all criminal offenses and civil causes of action arising in the Indian country located within this state, as Indian country is defined by Title 18 United States Code, section 1151, and obligates and binds this state to the assumption thereof, the provisions of chapter 106 of the Session Laws of the state of South Dakota for 1901, as amended, or any other law of this state to the contrary, notwithstanding.

[7]1961 S.D. Sess. L. ch. 464, § 4. SDCL 1-1-21 provides:

> Except as to criminal offenses and civil causes of action arising on any highways, as the term is defined in chapter 31-1, the jurisdiction provided for in § 1-1-18 shall not be deemed

(Footnote Continued)

legislature conditioned acceptance of civil and criminal jurisdiction on federal reimbursement. An exception was provided, however, whereby the State assumed jurisdiction over criminal offenses and civil causes of action on the highways without the requirement of federal reimbursement. The validity of this legislation is the lynchpin of this decision. Following the 1961 legislation, we held that these statutes were ineffective because the State could not assume partial jurisdiction over Indian

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(Footnote Continued)

> assumed or accepted by this state, and §§ 1-1-18 and 1-1-20 shall not be considered in effect, unless and until the Governor of the state of South Dakota, if satisfied that the United States of America has made proper provision for the reimbursement to this state and its counties for the added costs in connection with the assumption of said jurisdiction, has issued his proper proclamation duly filed with the secretary of state declaring the said jurisdiction to be assumed and accepted.

country. See In re Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964). We then changed course for partial jurisdiction on the highways in Onihan, supra, after the United States Supreme Court held that the state of Washington had validly assumed partial jurisdiction over reservations in the case of Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979).

Now, we must reconsider our position again in light of the decision of the United States Court of Appeals in Rosebud Sioux Tribe v. South Dakota, 900 F.2d 1164 (8th Cir. 1990). Rosebud reversed the district court's decision which had sustained the state's exercise of jurisdiction over highways running through reservations in the state, on two principal grounds. First, the 1961 legislation did not validly retrocede jurisdiction to the State within the terms of

PL 280. The Rosebud court found that our decision in Onihan had misinterpreted Yakima, thereby improperly overruling the Hankins decision that the State lacked PL 280 jurisdiction. Speaking of the differences between the assumption of jurisdiction in Yakima versus our legislature's actions, the Eighth Circuit stated:

> The major concerns reflected in the passage of PL 280 were (1) to reduce the economic burden of federal jurisdiction over reservations, (2) to respond to a perceived hiatus in law enforcement on reservations, and (3) to assimilate Indians into the general population. Yakima, 439 U.S. at 498.
>
> We believe South Dakota's limited excursion into the area of Indian jurisdiction is not responsive to the concerns underlying the passage of PL 280. Jurisdiction over highways does not go very far in reducing lawlessness on reservations, but simply introduces a third party to the already complex jurisdiction pattern on reservations. It also does little to reduce federal presence on reservations since the federal government retains the financial burden of the majority of jurisdictional con-

> cerns. The Washington statute, which left open the possibility of complete jurisdiction upon tribal consent, reflected an acceptance of the burden of jurisdiction, as well as an attempt to accommodate tribal self-governance. The state's partial jurisdiction assumption here represents the contrary result. We believe that the failure to assume jurisdiction in a manner consistent with the purposes of PL 280 is not sufficient "action within the terms of the offer made by Congress to the States in 1953."

900 F.2d at 1170-71 (footnotes omitted).

Second, the Eighth Circuit found that Congress, by amending PL 280 in 1968[8] and requiring tribal consent to any new assumption of jurisdiction, vested the interests of the tribes in self-government and precluded South Dakota from enforcing its 1961 legislation because it was improper to apply Yakima retroactively. The court explained:

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[8]Act of April 11, 1968, Pub. L. 90-284, Title IV, § 403, 82 Stat. 79 (codified at 25 U.S.C. § 1323 (1983)).

> The Tribes, particularly in South Dakota, have relied on the protection offered by the tribal consent amendment since 1968. The Tribes have co-existed with state authorities with the knowledge that the state could not assume jurisdiction over them without their consent. The state allowed federal and tribal authorities to exercise jurisdiction prior to and after 1968 without asserting its claim to jurisdiction. Retroactive application of the Yakima interpretation of P.L. 280 to revive South Dakota's 1961 legislation would disregard the manner in which the Tribes and the state have structured their jurisdictional relationship.
>
> . . .
>
> [T]he congressional intent in passing the 1968 amendment did not contemplate that a subsequent, retroactive application of a change in statutory interpretation could alter South Dakota's lack of jurisdiction existing at the time of the repeal of section 7.

900 F.2d at 1173, 1174. Accordingly, South Dakota does not have jurisdiction over Indian country, nor may the State exercise partial jurisdiction over highways running through the reservations.

Since South Dakota had no jurisdiction on the reservation, our fresh pursuit statute could not reach onto the reservation and we are left with the question: What effect did Krone's incursion onto the reservation have on the trial of Spotted Horse?

We first consider Spotted Horse's argument that the trial court lacked jurisdiction to try him on the charges. He acknowledges our holding in State v. Winckler, 260 N.W.2d 356 (S.D. 1977), where we said:

> When a person accused of a crime is found within the territorial jurisdiction wherein he is so charged and is held under process legally issued from a court of that jurisdiction, neither the jurisdiction of the court nor the right to put him on trial for the offense charged is impaired by the manner in which he was brought from another jurisdiction, whether by kidnapping, illegal arrest, abduction, or irregular extradition proceedings.

Id. at 363 (citing 4 Wharton's Criminal Procedures § 1484, at 39-40 (1957)). This

rule, the Ker-Frisbie rule, is an adaptation of the rules of Ker v. Illinois, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886) and Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952), originally adopted by this court in an earlier decision, State v. Thundershield, 90 S.D. 391, 399, 242 N.W.2d 159, 163-64 (1976). Spotted Horse urges us to reexamine our holding in Winckler in light of the authority found in United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

In Winckler the offense charged, assault with a dangerous weapon without intent to kill, was committed by the Indian defendants firing guns from trust land at officers who were outside the trust land. The defendants surrendered to an officer of the B.I.A. police, who then simply turned them over to State authorities for prosecution. In comparison, the defendant in Toscanino alleged

that he was kidnapped in Uruguay by American agents, tortured, and abducted to the United States for the purpose of prosecution here. The Winckler decision referred to our Thundershield decision and eschewed Toscanino. Thundershield involved an extradition technicality, a purely statutory violation, not claimed to be of constitutional dimension.

More recently we applied the same rule in Quiver v. State, 339 N.W.2d 303, 305 (S.D. 1983), referring to it as the Ker rule. In Quiver, no Indian jurisdiction was involved; rather it was a question of procedurally incorrect extradition from Nebraska.

In the context of Indian jurisdiction cases, the rule found in Ker and Frisbie was criticized by the New Mexico Supreme Court in Benally v. Marcum, 89 N.M. 463, 553 P.2d 1270 (1976). Citing Toscanino, the decision first noted the expansion of the concept of due

process to protect the accused against pre-trial illegality. The decision went on to point out how the Navajo tribe "has provided specific procedures for extraditing persons accused of crime from the reservation" and the Navajo tribal government's exercise of the sovereign power vested in them. 89 N.M. at ___, 553 P.2d at 274.

Although we find Spotted Horse's case can be factually distinguished from Thundershield, Winckler and Quiver, and it is a very close case based on the actions of the police officer, we are not persuaded to abandon our rule at this time. Even though Krone chased defendant at breakneck speeds which were unwarranted considering the nature of the violation (expired license plate stickers), and engaged in a battle using his night stick, his actions cannot be equated with torture. No doubt, in pursuing Spotted Horse, Krone was relying, to some degree, on

our decision in Onihan. Further, because the record reflects that the Standing Rock Sioux Tribe has not enacted into their tribal code any provisions for extradition, we are left with the firm conviction that, at least for the present, we should retain our established rule. Thus, we hold that the trial court had jurisdiction over Spotted Horse for the purpose of trial.

In arriving at this decision, we are also aware of the discussion in Toscanino, supra, wherein the court discussed the development of the concept of due process "which now protects the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part." 500 F.2d at 275. The court went on to point out:

> Although the issue in most of the cases forming part of this evolutionary process was whether

> evidence should have been excluded (e.g., Mapp, Miranda, Wong Sun, Silverman), it was unnecessary in those cases to invoke any other sanction to insure that an ultimate conviction would not rest on governmental illegality.

Id.

We then examine the correlative issue, whether the evidence, particularly the field sobriety test and the blood test results, resulting from Spotted Horse's arrest were admissible at trial. Although Spotted Horse raises no issue on the admissibility of the field sobriety tests, and only challenges the admission of the blood tests on statutory grounds regarding the drawing of the blood sample, we review this very important issue under the doctrine of plain error. SDCL 23A-44-15. Under the doctrine of Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the exclusionary rule generally makes inadmissible against the defendant evidence that is the product of an

unconstitutional arrest. As the court explained in Wong Sun, the purpose of the rule is to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person. The exclusionary prohibition extends to indirect as well as direct evidence; physical tangible materials obtained either during or as a direct result of an unlawful invasion, come at by exploitation of the illegal search; and testimony of matters observed during an unlawful invasion to enforce the basic constitutional policies. The seizure of Spotted Horse by Krone was clearly a violation of Spotted Horse's Fourth Amendment rights, thus suppression would seem to be automatic. However, there are some jurisdictions which have made some distinctions whereby the admission of such evidence has been permitted.

In People v. Wolf, 635 P.2d 213 (Colo. 1981), the Denver police made a stakeout and arrest in an adjoining county, beyond their jurisdiction, collected evidence, and turned the case over to the local authorities for prosecution. The Colorado Supreme Court determined that the police had the power to make a citizen's arrest where probable cause existed. The court went on, however, to caution that in cases where the police act in willful disobedience of the law, the courts have not hesitated to use their supervisory powers to exclude evidence. Id. at 217.

Here, Krone was not in the process of making a citizen's arrest, assuming such an arrest is possible under tribal ordinances. The violation for which he was initially and principally making the arrest, failure to display current vehicle registration, was not even an offense triable on the reservation. With respect to the DUI offense, Krone did

not follow proper procedures. He transported Spotted Horse back to Walworth County for trial rather than turn him over to tribal authorities. Likewise, in City of Kettering v. Hollen, 416 N.E.2d 598 (Ohio 1980), the Ohio Supreme Court, in a rather shallow opinion, determined that the exclusionary rule was not applicable to a DUI defendant arrested by a Kettering police officer in adjoining Dayton. The officer was engaged in hot pursuit. Nevertheless, the court assumed from an insufficient record that the arrest was unauthorized. The court held that the exclusionary rule, applicable for violations of a constitutional nature only, would not be applied to evidence which is the product of police conduct violative of state law, but not violative of constitutional rights. Id. at 600. Because we view Krone's actions in pursuing Spotted Horse down the reservation highway, into the housing area and onto his

front lawn to be a constitutional violation, far above simple statutory violations, we hold that the evidence attained by the unconstitutional arrest is not admissible against Spotted Horse. We therefore reverse the conviction for driving under the influence.

However, since the failure to display current registration offense was committed off the reservation, and independent evidence was obtained through Krone's observation before the illegal arrest, we affirm the verdict on this offense. Winkler [sic], supra (manner of arrest, even including illegal arrest on reservation, does not bar prosecution).

That issue decided, we feel compelled to comment on the need for a solution to this gap in criminal jurisdiction. When a crime is committed off the reservation and criminals can flee unimpeded onto the reservation, both Indians and non-Indians alike are

harmed. We would hope that in this year which the Governor has proclaimed "The Year of Reconciliation," that both tribal leaders and governmental officials will sit down and work out treaties that will remedy this situation.

2. Suppression of Evidence

Next, because Spotted Horse's conviction on expired license plates is preserved, we consider his argument that Krone's use of excessive force in making the arrest was a violation of SDCL 23A-3-5[9] and required suppression of evidence on all charges or, in the alternative, a jury instruction providing that an illegal arrest provided a defense to all the charges.

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[9]SDCL 23A-3-5 provides, in pertinent part: "No person shall subject an arrested person to more physical restraint than is reasonably necessary to effect the arrest[.]"

Before we may reverse the trial court on a motion to suppress, Spotted Horse must demonstrate that the trial court abused its discretion in not suppressing the evidence. State v. Bartlett, 411 N.W.2d 411, 414 (S.D. 1987). Spotted Horse fails to meet this burden.

We begin by noting that there is a paucity of evidence that supports Spotted Horse's contention that he was brutally beaten. Also, Spotted Horse conveniently does not mention his resistance in leaving his car. Faced with this dearth of evidence, the trial court did not abuse its discretion in refusing to give the instruction or suppressing the evidence. Bartlett, supra. Furthermore, we can find no precedent for an exclusionary rule that would extend suppression of evidence to unrelated offenses and the cases cited by Spotted Horse certainly do not warrant this conclusion.

Contrary to Spotted Horse's contention, State v. Gage, 302 N.W.2d 793 (S.D. 1981), merely stands for the proposition that insufficient information in an affidavit for a warrant deprived the police of probable cause and thereby makes an arrest illegal. As we noted earlier, even though the arrest on the reservation was illegal, that does not prevent prosecution on the failure to display current registration sticker offense. Winckler, supra.

Nor does Brown v. Wyman, 224 Mich. 360, 195 N.W. 52 (1923), stand for the proposition that excessive force invalidates an arrest. Brown is a civil case that awarded civil damages to a plaintiff who was struck in the face with a black jack by a sheriff making an arrest. Instead of supporting Spotted Horse's argument, Brown points to Spotted Horse's proper remedy--a civil suit for

damages, not application of the exclusionary rule.

Nor is State v. Rich, 417 N.W.2d 868 (S.D. 1988), support for creation of a new exclusionary rule. Rich involved an assault by a private citizen and the availability to the defendant of the privilege of self-defense or defense of another. Nothing within the decision supports this novel expansion of the exclusionary rule that Spotted Horse now urges.

Finally, contrary to Spotted Horse's argument, United States ex rel. Means v. Solem, 646 F.2d 322 (8th Cir. 1980), stands only for the proposition that a defendant may be entitled to a self-defense instruction or defense of others in a riot situation if excessive force is used. It does not stand for, nor can we find, any precedent that states that a defendant is entitled to an acquittal on unrelated charges if excessive

force is used during an arrest. Sufficient deterrence to police misconduct is provided if the excessive force invalidates a resisting arrest charge. Further, Spotted Horse would be entitled to pursue civil remedies against the officer. These two factors together provide a more than sufficient remedy for this type of conduct.

Because we have suppressed the blood test as the fruits of an illegal arrest, Spotted Horse's third issue is moot.

DECISION

Therefore, we reverse the trial court on the conviction for DUI and affirm on the conviction for failure to display current registration and instruct the trial court to enter an order in conformity with this opinion.

MILLER, Chief Justice, WUEST and SABERS, Justices, concur.

HENDERSON, Justice, concurs specially.

HENDERSON, Justice (specially concurring).

As one reads through the thread of the majority opinion, it becomes obvious that this Court, and thus this State, is enlightening itself by (a) having its decisions reversed and (b) finally recognizing that there is a tribal sovereignty concept which spreads across the reservations, not only in South Dakota, but across this nation.

To have condoned this officer's jurisdiction, on a private driveway, where the defendant was arrested, would be granting authority unto law enforcement officers in this state defying the recognition of tribal sovereignty and independence. Such recognition would simply cause the mandates of Public Law 280 to be a nullity. Therefore, I concur in the majority's holding reversing the DUI conviction.

As I concur in this opinion, I call attention to my special concurrence in State v. Onihan, 427 N.W.2d 365 (S.D. 1988):

> As one continues to struggle in reading the law, it is perceived that gradations of jurisdiction exist, not to mention variances, as the type of Indian jurisdiction cases surface in the appellate bodies. Specifically, in this type of case, basic questions should be asked: Does this case involve tort law? Family law? Criminal law? If the latter, does the case pertain to one of the major crimes? See 18 U.S.C. § 1153. Or are we just considering a minor crime? An analysis must further encompass the specific situs of the facts giving rise to the litigation. One must consider: Are the parties Indian or non-Indian? Does the Indian Child Welfare Act apply? Two authors, Davis H. Getches and Charles F. Wilkinson, in their treatise, Federal Indian Law (2d ed. 1986), write that the jurisdictional maze in criminal cases can be "walked with some confidence" when an analytical approach is followed. Supra, at 412. Briefly, their analysis contains these steps:
>
> 1. Was the locus of the crime in Indian Country?
> 2. Does Public Law 280 or a specific jurisdictional

statute apply? Here, Public Law 280 is governing.

3. Was the crime committed by or against an Indian?
4. Which Defendant-Victim category applies? This question includes "victimless" and "consensual" crimes.

See Federal Indian Law, supra, at 412-415.

This point I try to make: Jurisdiction depends upon many factors. History of the particular reservation involved,[1] as well as legislative enactments of the particular

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[1]South Dakota has nine Indian Reservations, and each has an active tribal court. Seven have tribal courts which originate in a tribal sovereignty predating the United States Constitution. Two tribal courts are derived from the federally created Courts of Indian Offenses. These tribal courts are all subject to Congressional authority. See generally F. Pommersheim, South Dakota Tribal Court Handbook (March 1988). The Sisseton-Wahpeton Sioux Reservation, formerly the Lake Traverse Indian Reservation, was technically terminated as a "reservation" in 1891, but retains some attributes of reservation status. See DeCoteau v. District County Court, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).

> state, likewise play a vital role. Each case must be scrutinized to determine where jurisdiction lies. Indian jurisdiction is a complex subject and is not ordinarily amenable to black and white solutions. There are many areas of gray in this kind of litigation. Overlaying all of the above is the shifting sand of federal policy which spawns further complicated and knotty difficulties and entanglements. One law review article has characterized Indian policy as having "vacillated between assimilation, annihilation, and self-determination." Note, Recognition of Tribal Decisions in State Courts, 37 Stan.L.Rev. 1397, 1399 (1985).

I wish to further call attention to my concurring in result in Wells v. Wells, 452 N.W.2d 123 (S.D. 1990).

> As I pen my legal thoughts, a wave of legal concern comes upon my spirit. For over one decade, I have attempted to recognize the Indian community's struggle for social and governmental autonomy, as well as justice for our Red Brothers in this State's courts. State v. Chief Eagle, 377 N.W.2d 141 (S.D. 1985), Henderson, J., dissenting. Comity and mutual respect to the decisions of tribal courts has been a long time message of mine. Mexican. I have in the

past, and now, recognize that in South Dakota we have tribal and state court systems. As found in the 1990 Legislative Senate Journal (pg. 60, 2nd legislative day), our present Governor has declared this year to be a Year of Reconciliation, requesting Indians and non-Indians to come closer together. Our Governor has asked us to set goals, to make strides toward better understanding in 1990. He is quoted in an article on page 2 of the Rapid City Journal, January 12, 1990 as follows: "The end result should not only be fun, but mutual respect and trust." Chairperson, Judy Petersen, who acts as the "Chairman" of the Flandreau Sioux Tribe, observed that the gathering should go beyond pure enjoyment. Governor Mickelson thus appeared before the State Indian Affairs Commission on January 11, 1990 in an attempt to bring together the Indian and white community in a spirit of friendship. Id. pg. 1.

On February 1, 1990, Governor Mickelson and representatives of eight of the state's nine Sioux Tribes began what has now been called the "Year of Reconciliation." The Governor sat cross-legged on the floor or [sic] our State Capitol rotunda and shared a peace pipe with these Sioux representatives. Filled with legislators, state and tribal officials, the rotunda rang out with tradi-

tional Indian songs honoring the Indian people and expressing a hope for peace. See, Rapid City Journal, pg. 1, February 2, 1990.

This is the beginning of the second century of South Dakota statehood. It is good that Indians and whites now seek a year of racial understanding and a new beginning of peace with one another.

Alas, but hopefully only for a moment, as the tide of understanding ebbs and flows, South Dakotans read, via a February 3, 1990, Rapid City Journal article that our Governor has said: "We're not going to solve jurisdictional issues." He also expressed that jurisdictional disputes could not be settled by the State and tribes and should not be part of the 1990 Reconciliation effort. Disappointment was expressed by the Chairman of the Cheyenne River Sioux Tribe who observed that the gatherings should go beyond pure enjoyment thereof indicating that: "If he's (the Governor) not interested in jurisdictional things and the issues that are really tearing us apart, there is no sense trying to pull this thing together. It's rhetoric." However, other tribal leaders took a more positive approach after the reconciliation ceremony. Increased understanding by the non-Indians and Indians could bring about help and economic development, health care and

> education for Indian people, they asserted.
>
> A deep wound exists in the State of South Dakota by virtue of jurisdictional disputes between tribal courts and state courts.[2] The Indians tell us that their inherent sovereignty pre-dates the Constitution of the United States. They want to decide cases, within tribal courts, which involve their people and their children. State court actions which undermine the authority of tribal courts are an impermissible infringement upon the rights of tribal self-government. Williams v. Lee, 358 U.S. 217, 223, 79 S.Ct. 269, 272. Let us, in the Year of Reconciliation, pursue all avenues of peace to included [sic] open-minded solutions to jurisdictional conflict between the Indians and non-Indians of this state.

I wrote specially in Wells because I was concerned with the sovereignty of tribal courts. In Wells, I called attention to a shining example of how this Court recognized the rights of Native Americans to care for

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[2]This Spotted Horse decision is a tender leaf of hope; let us pray that it blossoms.

and watch over and protect their own children in their own courts. In re Guardianship of D.L.L. & C.L.L., 291 N.W.2d 278 (S.D. 1980). In that special writing, I quoted Federal Judge Bogue as expressing in Cheyenne River Sioux Tribe v. Kleppe, 424 F.Supp. 448 (D.S.D. 1977):

> ... All too often courts seem to pay little more than lip service to the right and power of Indian people to govern themselves.

Again, in Wells, I admonished that Native American people should have jurisdiction over disputes between their own people on their reservations. I quote from my writing:

> If state court jurisdiction on Indians or activities on Indian land would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law. The United States Supreme Court in Iowa Mutual Ins. Co. v. LaPlante et al., 480 U.S. 9, 107 S.Ct. 971, 74 L.Ed.2d 10 (1987) declared, inter alia, 'We have repeatedly recognized the

> Federal Government's long standing policy of encouraging tribal self-government... Tribal courts play a vital role in tribal self-government (citation omitted), and the Federal Government has consistently encouraged their development.

Further, in Wells, I stated:

> Land within the limits of any Indian Reservation under jurisdiction of the United States Government is in Indian country. 18 U.S.C. § 1151.

I now note, come the dawn, that the majority opinion now expresses: "Accordingly, South Dakota does not have jurisdiction over Indian country nor may the state exercise partial jurisdiction over highways running through the reservations."

In Wells, I stated:

> South Dakota has long danced with Public Law 280. It has unsuccessfully attempted to conditionally or partially assume civil and criminal jurisdiction over Indians and Indian territory. See, In re High Pine, 99 N.W.2d 38 (S.D. 1959). Said decision overruled Chapter 391 of the Session Laws of 1957 which gave South Dakota criminal and

civil jurisdiction over Indian land. Another key decision in this Court is In re Hankin's [sic] Petition, 125 N.W.2d 839 (S.D. 1964). In Hankin, [sic] chapter 464 of the Session Laws of 1961 was ruled inconsistent with the congressional purposes of Public Law 280. There has been a historic struggle by the State Legislature with the Congress of the United States to acquire, in one fashion or the other, state jurisdiction to supplant inherent tribal sovereignty. In the end, the Crow Creek Tribe has a right to make and enforce its own laws subject only to the will of Congress. The members of this Court cannot manifest a power, by broad language, to carte blanche assume jurisdiction over controversies between the Indians exclusively arising within the borders of their own reservation. Hearken unto the words of a unanimous United States Supreme Court decision, United States v. Mazurie, 419 U.S. 544, 556, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975), reversing a 1973 Tenth Circuit Court decision as found at 487 F.2d 14. Speaking through Justice Rehnquist the highest court of this land stated:

> This Court has recognized limits on the authority of Congress to delegate its legislative power... Those limitations are, less stringent in cases where the entity

> exercising the delegated authority itself possesses independent authority over the subject matter ... Thus, it is an important aspect of this case that Indian tribes are unique aggregations possessing attri-butes of sovereignty over both their members and their territory, they are a 'separate people,' possessing 'the power of regulating their internal and social relations ...'
>
> Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

I wish to point out that this arrest was a reckless arrest and did not justify a 109 mile per hour pursuit, all mind you, arising from an invalid license plate sticker, a class two misdemeanor. This Native American defendant was arrested some 7 to 8 miles within the reservation, on a private driveway (his own). This area was expressly outside the scope of the jurisdictional mandate of SDCL 1-1-21 and SDCL 31-1-1. No action has ever been taken to acquire jurisdiction over a privately owned driveway and yard some 8

miles within the territorial boundary of an Indian Reservation in South Dakota. There are no federal statutes currently authorizing fresh pursuit by state officers onto an Indian Reservation. True, the primary concern of Congress in enacting Public Law 280 was to deal with the problem of lawlessness and the absence of adequate law enforcement on certain reservations. See, Rosebud Sioux Tribe v. South Dakota, 709 F.Supp. at 511. This does not, however, absolve the State of South Dakota from meeting the requirements imposed by federal law to attain such goals.

In Benally v. Marcum, 553 P.2d 1270, 1273 (N.Mex. 1976), the New Mexico Supreme Court held that state courts could not try Native Americans who are arrested on a reservation for an off-reservation crime. Perhaps that is good authority for reversing the invalid license plate sticker conviction.

However, this Court's analysis is based upon Winkler [sic], a contrary viewpoint. So we are standing upon 1977 precedent. Is that precedent sound? Is it sound when one considers the more recent decisions in the federal courts? I full well understand that the majority opinion believes the offense was committed off the reservation and the officer could see the plates. Hence, though an illegal arrest, we can, so the majority says, affirm the verdict on this offense. An arrest such as this should also be the subject of future efforts between Native Americans and the white legal community. It could well be that this arrest is another "gap in criminal jurisdiction." Certainly, this type of scenario is no novelty in South Dakota.

Accordingly, I now welcome the other four members of this Court to my views on reconciliation, including jurisdiction, so

that Native Americans and the white community can gather in the spirit of giving and understanding which would trigger the elimination of prosecutorial clouds. In the immortal words of Isaiah "Come, let us reason together."

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 90-1003

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF SOUTH DAKOTA,

PETITIONER

vs.

PETER SPOTTED HORSE, JR.,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

STATE OF SOUTH DAKOTA

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Randolph J. Seiler
SEILER & CAIN
Attorney for Respondent
210 East Grand Crossing Blvd.
P.O. Drawer 490
Mobridge, South Dakota 57601-0490
(605) 845-2981

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INTRODUCTION AND STATEMENT OF CASE

This case -- like No. 90-749[1/] -- involves South Dakota's claim to jurisdiction over Indians on the highways within Indian Reservations in the state. Both the unanimous South Dakota Supreme Court in this case, and a unanimous panel of the United States Court of Appeals for the Eighth Circuit in No. 90-749, held South Dakota does not have this jurisdiction. South Dakota has filed a petition for writ of certiorari in both cases, raising the identical issues in each.

1/ Rosebud Sioux Tribe, et al. v. South Dakota, et al., 900 F.2d 1164 (8th Cir. 1990), petition for certiorari pending No. 90-749.

The opposition filed in No. 90-749 -- on behalf of four major South Dakota tribes -- provides detailed reasons for denying the writ, including (1) there is no conflict between the State and federal courts, (2) the case has no application outside South Dakota and is thus not of general importance, and (3) the rulings preserve longstanding jurisdictional arrangements. Respondent here adopts the arguments set forth in the opposition in No. 90-749. Two points bear additional emphasis.

REASONS FOR DENYING THE WRIT

I. The State is seeking to reverse its longstanding recognition of tribal jurisdiction.

The State's current position in these cases reverses its own longstanding practice of acknowledging tribal jurisdiction over tribal members on reservation highways, and cooperating with tribal and Bureau of Indian Affairs law enforcement officers in bringing tribal members to justice in tribal courts. On the Standing Rock Sioux Reservation, where the arrest in this case was made, the State, Tribe and Bureau of Indian Affairs had worked cooperatively with respect to law enforcement on the reservation highways until the State abruptly reversed its position in the late 1980s. Under this practice, state highway patrol officers -- like BIA police officers -- took action against tribal members who committed infractions on reservation highways. If a state highway patrol officer was on the scene, he took the initial law enforcement action. All prosecutions involving highway offenses by members of the Tribe -- including those initiated by state highway patrol officers -- proceeded in tribal court. The tribal court honored citations, complaints and

evidence submitted to it by the State Highway Patrol. And the State -- until the late 1980s -- recognized the tribal court's authority regarding highway matters involving tribal members. This cooperative practice was well known by the public at large -- both Indian and non-Indian.

The Eighth Circuit noted in No. 90-749 that this type of cooperative law enforcement on Indian Reservations in South Dakota extends back to the 1960s. As the South Dakota Legislative Research Council reported in 1964:

> As a practical matter, despite the Hankins ruling, South Dakota does maintain some control of law and order on the public highways running through Indian reservations, through agreements on procedures among the respective tribal councils, the U.S. Bureau of Indian Affairs, and the office of the State Attorney General representing the Highway Patrol. Under these agreements, in order to eliminate legal questions of jurisdiction, highway patrolmen and tribal agents are "cross-commissioned" so their power of arrest cannot be challenged in court. The patrolmen police the highways as they do elsewhere in the state. Indians arrested by them are turned over to tribal courts; non-Indians will be tried in state courts.

900 F.2d at 1170, quoting Staff Report, Jurisdiction Over Indian Country in South Dakota at 7 (S.D. Legis. Research Council, Mar. 5, 1964).

Until it was breached by the State in the late 1980s, this arrangement had proved effective in providing comprehensive law enforcement authority.

The State's effort to abrogate this arrangement does not mean, however, that a significant gap exists in law enforcement. If this Court declines review as we urge, the Tribe and United States will keep the jurisdiction over tribal members they have

always exercised, and the State will be free to reinstate these cooperative law enforcement arrangements, which historically have worked well.[2/]

II. This case involves statutory construction, not retroactivity.

Despite the State's claim, retroactivity, is not an issue nor was it an issue at any point in this case. Neither at trial, nor in the South Dakota Supreme Court, did either party raise any issue regarding retroactivity. Nevertheless, South Dakota, using dictum from the Eighth Circuit's opinion in No. 90-749, now seeks to transform this into a retroactivity case (see Pet., pp. 32-33).

This case concerns two issues of statutory interpretation. The first is whether South Dakota's 1961 Act -- asserting jurisdiction over Reservation highways -- complied with Public Law 280 as enacted in 1953. On this issue, both the South Dakota Supreme Court here and the Court of Appeals in No. 90-749 expressly applied this Court's ruling in Washington v. Yakima Indian Nation, 439 U.S. 463 (1979), and held that "South Dakota's limited excursion into the area of Indian jurisdiction is not responsive to the concerns underlying the passage of P.L. 280." State v. Spotted Horse, Appendix to the Petition ("App.") p. 13, quoting 900 F.2d at 1170.

2/ The State's petition (Pet., p. 40) alleges high rates of fatalities on the Reservation highways in South Dakota. This was not an issue in this case -- no facts were presented, and no findings were made. Corson County -- which encompasses all of the Standing Rock Reservation in South Dakota -- has one of the most economically disadvantaged populations of any county in the Nation, and has many miles of rural roads in various states of disrepair and poor condition.

The second issue is whether South Dakota's efforts to assert jurisdiction, after this Court's decision in Yakima, complied with the 1968 Amendments to Public Law 280 -- which required tribal consent for any new state assertions of jurisdiction over Indian country. The Court in Yakima did not reach this or any issue involving the 1968 tribal consent provision. This is because in Yakima -- unlike this case -- Washington's assertion of jurisdiction began prior to 1968 and was continuously exercised thereafter. The applicability of the 1968 tribal consent provision here turns not on prospective or retroactive application of Yakima, but on interpretation of the intent of Congress in the 1968 Amendments. As to this issue, the South Dakota Supreme Court and the Eighth Circuit held that the 1968 Amendments "eliminate[d] completely the ability of a state to assume jurisdiction, without tribal consent, at any time and in any manner after 1968." 900 F.2d at 1172.

This is all that was necessary to resolve the case. In No. 90-749, the Eighth Circuit added, in dictum, that retroactive application of Yakima would not be used to defeat Congress' intent in the 1968 Amendments. 900 F.2d at 1172-74. This is simply another way of articulating this Court's mandate that lower courts "construe the effect of legislation affecting reservation Indians in light of 'intervening' legislative enactments." Bryan v. Itasca County, 426 U.S. 373, 386 (1976). This is precisely what the South Dakota Supreme Court and Eighth Circuit did. As the Eighth Circuit stated:

> We cannot ignore the dramatic shift in national policy toward Indians that is reflected by the tribal consent amendment.

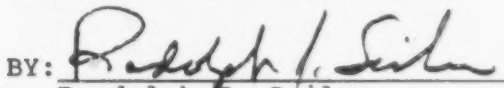
> To allow the state's claim of jurisdiction would defeat the purpose of the 1968 amendment, and disregard the manner in which the parties have structured their relationship. South Dakota cannot take advantage of a change in statutory construction without also recognizing the intervening legislation imposing new prerequisites on assumptions of jurisdiction. Since South Dakota has not obtained the consent of the Tribes since 1968, its claim of jurisdiction, made only since the advent of Washington v. Yakima Indian Nation in 1979 is invalid.

900 F.2d at 1174.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

BY: 

Randolph U. Seiler
SEILER & CAIN
210 East Grand Crossing Blvd.
P.O. Drawer 490
Mobridge, South Dakota 57601
(605) 845-2981

APPENDIX

STATE of South Dakota, Plaintiff and Appellee,

v.

Peter SPOTTED HORSE, Jr., Defendant and Appellant.

No. 16644.

Supreme Court of South Dakota.

Argued Jan. 9, 1990.

Decided Oct. 4, 1990.

Indian, who was enrolled member of Indian tribe and who resided on tribal reservation, was convicted of driving under influence of alcoholic beverage and failure to display current registration following jury trial before the Circuit Court, Walworth County, Leland J. Berndt, J. Indian appealed. The Supreme Court, Morgan, J., held that: (1) South Dakota does not have jurisdiction over Indian country, nor may State exercise partial jurisdiction over highways running through reservations; (2) officer's arrest of Indian on reservation was illegal arrest; (3) illegal arrest did not deprive trial court of jurisdiction to try Indian, even though municipal officer's chase of Indian onto reservation was unwarranted considering nature of suspected violation of expired license plate stickers and force was used in securing arrest; (4) evidence of DUI obtained by unconstitutional arrest of Indian was not admissible against him, and thus evidence was insufficient to sustain conviction for DUI; (5) independent evidence, obtained through officer's observation before illegal arrest, was sufficient to sustain conviction of failure to display current registration; and (6) alleged use of excessive force by officer in effecting illegal arrest did not require suppression of evidence on all charges.

Convictions reversed in part and affirmed in part.

Henderson, J., filed opinion concurring specially.

1. Criminal Law ⇐1139

Because issues regarding removal of constitutional disclaimers of state jurisdiction are questions of state law, they are reviewed de novo by Supreme Court. SDCL 1-1-18, 1-1-21; Laws 1951, ch. 187, § 1 et seq.; Laws 1957, ch. 319, § 1 et seq.; Laws 1959, ch. 144, §§ 1, 2.

2. Indians ⇐27(2), 38(2)

Validity of retrocession of jurisdiction under federal statute granting "disclaimer states" statutory power to assume civil and criminal jurisdiction over reservations if State passes legislation to accept jurisdiction is question of federal law. 18 U.S.C.A. § 1162; 28 U.S.C.A. § 1360.

3. Indians ⇐27(2), 38(2)

South Dakota does not have jurisdiction over Indian country, nor may State exercise partial jurisdiction over highways running through reservations. SDCL 1-1-18, 1-1-21; 18 U.S.C.A. § 1162; 28 U.S.C.A. § 1360.

4. Arrest ⇐66(3)

Fresh pursuit statute could not reach onto reservation over which State of South Dakota did not have jurisdiction. SDCL 1-1-18, 1-1-21; 18 U.S.C.A. § 1162; 28 U.S.C.A. § 1360.

5. Criminal Law ⇐99
Indians ⇐38(2)

State trial court had jurisdiction to try Indian who committed misdemeanor off reservation, but who fled to reservation and was illegally arrested there by municipal police officer, even though municipal police officer chased Indian at breakneck speeds, which were unwarranted considering nature of suspected violation, and engaged in "battle" using nightstick, particularly where Indian reservation had not enacted into tribal code any provisions for extradition. SDCL 1-1-18, 1-1-21, 32-5-98; 18 U.S.C.A. § 1162; 28 U.S.C.A. § 1360.

6. Indians ⇐38(6)

Supreme Court would address issue of admissibility of field sobriety test and blood test results taken from Indian who was illegally arrested on-reservation by

municipal officer for misdemeanor committed off reservation under doctrine of plain error, even though Indian raised no issue as to admissibility of field sobriety test with respect to driving under influence charge, given importance of issue under exclusionary rule. SDCL 23A-44-15; U.S. C.A. Const.Amend. 4.

7. Criminal Law ⇐394.4(14)

Evidence obtained by unconstitutional arrest on reservation by municipal police officer who had pursued Indian for offense committed off reservation was not admissible against Indian in prosecution for driving under influence; officer pursued Indian down reservation highway and onto his front lawn for observed violation of registration law requiring display of current registration, and only subsequent to stop decided to arrest Indian for DUI based on smell of alcohol on Indian's breath. U.S. C.A. Const.Amend. 4.

8. Criminal Law ⇐99
Indians ⇐38(6)

Illegal arrest of Indian on reservation by municipal police officer for failure to display current registration did not require reversal of conviction of that offense where failure to display current registration offense was committed off reservation and independent evidence was obtained through officer's observation of that crime before illegal arrest and pursuit onto reservation.

9. Criminal Law ⇐1153(1)

Before Supreme Court may reverse trial court on motion to suppress, defendant must demonstrate that trial court abused its discretion in not suppressing evidence.

10. Criminal Law ⇐394.4(9)

Alleged excessive force used by municipal police officer in effecting arrest did not render abuse of discretion trial court's refusal to suppress evidence that was not obtained as result of arrest and was unrelated to excessive force allegedly employed; sufficient deterrent to police misconduct was provided if excessive force invalidated any resisting arrest charge, and arrestee was entitled to pursue civil remedies against officer.

John P. Guhin, Deputy Atty. Gen., Roger A. Tellinghuisen, Atty. Gen. (on brief), Pierre, for plaintiff and appellee.

Randolph J. Seiler of Seiler & Cain, Mobridge, for defendant and appellant.

MORGAN, Justice.

Peter Spotted Horse, Jr. (Spotted Horse) appeals[1] a judgment rendered on a jury verdict convicting him of driving while under the influence of an alcoholic beverage (DUI) and failure to display current registration. We affirm in part and reverse and remand in part.

FACTS

On April 1, 1988, Spotted Horse, an enrolled member of the Standing Rock Sioux Tribe who resided on the reservation, was driving off the reservation in the town of Mobridge, South Dakota. His car was not displaying valid 1988 license plate stickers, in violation of SDCL 32-5-98 (a Class 2 misdemeanor). Seeing this violation, Mobridge City Police Officer Roger Krone (Krone) attempted to stop the vehicle by turning on the red revolving light on top of his patrol car. This attempted stop occurred within the boundaries of the municipality of Mobridge.

Spotted Horse did not stop. Instead, he drove across the Missouri River bridge and onto the Standing Rock Sioux Reservation (reservation). Krone continued the pursuit with his siren running and red light flashing. The chase reached speeds ranging from 90 mph to 109 mph.[2] Spotted Horse

1. The Standing Rock Sioux Tribe filed an amicus curiae brief in support of Spotted Horse.

2. Justice Dunn, concurring specially in *State v. Seidschlaw*, 304 N.W.2d 102, 107-08 (S.D.1981), expressed well our opinion about these high-speed chases over minor traffic offenses.

> "I realize that in the presence of a violation of the law it is the duty of an officer to take steps to suppress the offense and apprehend the violator; however, this must be done within the limits of rationality. Here the acts of these officers has brought them to the very

proceeded north on Highway 1806, driving seven or eight miles onto the reservation. Spotted Horse then turned off of Highway 1806 and drove within the city limits of the town of Wakpala, then into a housing area, and onto a private driveway or yard. Krone continued following Spotted Horse the entire time, never losing sight of him.

Once Krone exited his police car, Spotted Horse began to drive away again. Krone ran to the vehicle, reached inside and shut off the ignition. There were two adults and two children in the car. Krone informed Spotted Horse that he did not have "current [license] plates" on his car and told him numerous times to get out of the car. Spotted Horse refused. Krone started pulling on Spotted Horse's arm to extract him from the car. The ensuing struggle went on for anywhere from five to fifteen minutes during which time Krone struck Spotted Horse three or four times with his nightstick, several of the blows hitting Spotted Horse in the head and cheek. Finally, Krone pulled Spotted Horse from the car by his hair or his left shoulder and upper arm, threw him to the ground on his stomach, put his knee on his back and handcuffed him. Following the handcuffing, Krone lifted Spotted Horse by the arms and placed him in the police car.

Spotted Horse was then taken back to Mobridge. On the ride back, Krone noticed the smell of alcohol on Spotted Horse's breath. After arriving back at the station in Mobridge, Krone administered the field sobriety test to Spotted Horse, which he failed. Following the test, Krone arrested Spotted Horse for DUI and read him the implied consent warnings. Spotted Horse agreed to take a blood test and was taken to the Mobridge Hospital for the extraction of blood. The BAC was 0.244.

Spotted Horse was charged with five counts: (1) eluding police in violation of SDCL 32-33-18 (Class 1 misdemeanor); (2) driving while under the influence in violation of SDCL 32-23-1 (Class 1 misdemeanor); (3) resisting arrest in violation of SDCL 22-11-4 (Class 1 misdemeanor); (4) driving without a license in violation of SDCL 32-12-22 (Class 2 misdemeanor); and (5) failure to display current registration in violation of SDCL 32-5-98 (Class 2 misdemeanor). After a jury trial, Spotted Horse was convicted of Counts 2 and 5, driving under the influence and failure to display current registration. He was acquitted of Counts 1 and 3, eluding police and resisting arrest.[3]

ISSUES

1. Did the trial court err in ruling that the State had jurisdiction to try an Indian who committed a misdemeanor off the reservation, but who fled to the reservation and was arrested by a municipal police officer on the reservation?
2. Did the trial court abuse its discretion in not suppressing evidence of unrelated crimes where the defendant alleged use of excessive force in making the arrest?
3. Did the trial court abuse its discretion in failing to suppress the blood test given to defendant because the blood was extracted by an LPN with expanded training?

ANALYSIS

[1, 2] We begin by discussing the appropriate standard of review. The jurisdictional challenge raised by this appeal involves the application and effect of SDCL 1-1-18 and 1-1-21, and procedural compliance with Public Law 280. Because issues regarding the removal of constitutional disclaimers of state jurisdiction are questions of state law, they are reviewed de novo by this court. *See Brown v. Egan Consol. School Dist. # 50-2*, 449 N.W.2d 259 (S.D. 1989); *Beville v. University of S.D. Bd. of Regents*, 420 N.W.2d 9 (S.D.1988). However, the question of substantive compliance with PL 280, *i.e.*, the validity of retrocession of PL 280 jurisdiction, is a question of federal law. *Tyndall v. Gunter*, 840 F.2d 617, 618 (8th Cir.1988). With these

edge of this precipice of rationality and may even have plunged them over that edge."

3. The fourth charge, driving without a license, was dismissed during trial.

standards in mind, we begin with Spotted Horse's argument that State lacked jurisdiction to make arrests on the reservation.

1. Jurisdiction

[3] To understand our ultimate conclusion, it is necessary to briefly retrace the intermittent nature of state jurisdiction over reservations. In 1953, Congress passed Public Law 280,[4] which gave disclaimer[5] states, such as South Dakota, statutory power to assume and exercise civil and criminal jurisdiction over reservations if they passed legislation to accept jurisdiction. *State v. Onihan*, 427 N.W.2d 365, 367 (S.D.1988). Though South Dakota made efforts to pass legislation in 1957 and 1959 to fulfill this mandate, the legislation was ultimately ineffective. *See In re High Pine*, 78 S.D. 121, 99 N.W.2d 38 (1959); 1951 S.D. Sess. L. ch. 187; 1957 S.D. Sess. L. ch. 319; 1959 S.D. Sess. L. ch. 144, §§ 1, 2.

Then, in 1961, South Dakota passed SDCL 1-1-18[6] and SDCL 1-1-21,[7] wherein the legislature conditioned acceptance of civil and criminal jurisdiction on federal reimbursement. An exception was provided, however, whereby the State assumed jurisdiction over criminal offenses and civil causes of action on the highways without the requirement of federal reimbursement. The validity of this legislation is the lynchpin of this decision. Following the 1961 legislation, we held that these statutes were ineffective because the State could not assume partial jurisdiction over Indian country. *See In re Hankins*, 80 S.D. 435, 125 N.W.2d 839 (1964). We then changed course for partial jurisdiction on the highways in *Onihan, supra*, after the United States Supreme Court held that the state of Washington had validly assumed partial jurisdiction over reservations in the case of *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979).

Now, we must reconsider our position again in light of the decision of the United States Court of Appeals in *Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir.1990). *Rosebud* reversed the district court's decision which had sustained the state's exercise of jurisdiction over highways running through reservations in the state, on two principal grounds. First, the 1961 legislation did not validly retrocede jurisdiction to the State within the terms of PL 280. The *Rosebud* court found that our decision in *Onihan* had misinterpreted *Yakima*, thereby improperly overruling the *Hankins* decision that the State lacked PL 280 jurisdiction. Speaking of the differences between the assumption of jurisdiction in *Yakima* versus our legislature's actions, the Eighth Circuit stated:

> The major concerns reflected in the passage of PL 280 were (1) to reduce the economic burden of federal jurisdiction

4. Act of August 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1976)).

5. The term "disclaimer state" designates those states which had constitutions or statutes containing organic law disclaimers of jurisdiction over Indian country. *State v. Onihan*, 427 N.W.2d 365, 367 (S.D.1988).

6. 1961 S.D. Sess. L. ch. 464, § 1. SDCL 1-1-18 provides:

> The state of South Dakota, in accordance with the provisions of 67 Statutes at Large, page 589 (Public Law 280), hereby assumes and accepts jurisdiction of all criminal offenses and civil causes of action arising in the Indian country located within this state, as Indian country is defined by Title 18 United States Code, section 1151, and obligates and binds this state to the assumption thereof, the provisions of chapter 106 of the Session Laws of the state of South Dakota for 1901, as amended, or any other law of this state to the contrary, notwithstanding.

7. 1961 S.D. Sess. L. ch. 464, § 4. SDCL 1-1-21 provides:

> Except as to criminal offenses and civil causes of action arising on any highways, as the term is defined in chapter 31-1, the jurisdiction provided for in § 1-1-18 shall not be deemed assumed or accepted by this state, and §§ 1-1-18 and 1-1-20 shall not be considered in effect, unless and until the Governor of the state of South Dakota, if satisfied that the United States of America has made proper provision for the reimbursement to this state and its counties for the added costs in connection with the assumption of said jurisdiction, has issued his proper proclamation duly filed with the secretary of state declaring the said jurisdiction to be assumed and accepted.

over reservations, (2) to respond to a perceived hiatus in law enforcement on reservations, and (3) to assimilate Indians into the general population. *Yakima*, 439 U.S. at 498 [99 S.Ct. at 760]. We believe South Dakota's limited excursion into the area of Indian jurisdiction is not responsive to the concerns underlying the passage of PL 280. Jurisdiction over highways does not go very far in reducing lawlessness on reservations, but simply introduces a third party to the already complex jurisdiction pattern on reservations. It also does little to reduce federal presence on reservations since the federal government retains the financial burden of the majority of jurisdictional concerns. The Washington statute, which left open the possibility of complete jurisdiction upon tribal consent, reflected an acceptance of the burden of jurisdiction, as well as an attempt to accommodate tribal self-governance. The state's partial jurisdiction assumption here represents the contrary result. We believe that the failure to assume jurisdiction in a manner consistent with the purposes of PL 280 is not sufficient "action within the terms of the offer made by Congress to the States in 1953."

900 F.2d at 1170–71 (footnotes omitted).

Second, the Eighth Circuit found that Congress, by amending PL 280 in 1968 [8] and requiring tribal consent to any new assumption of jurisdiction, vested the interests of the tribes in self-government and precluded South Dakota from enforcing its 1961 legislation because it was improper to apply *Yakima* retroactively. The court explained:

> The Tribes, particularly in South Dakota, have relied on the protection offered by the tribal consent amendment since 1968. The Tribes have co-existed with state authorities with the knowledge that the state could not assume jurisdiction over them without their consent. The state allowed federal and tribal authorities to exercise jurisdiction prior to and after 1968 without asserting its claim to jurisdiction. Retroactive application of the *Yakima* interpretation of PL 280 to revive South Dakota's 1961 legislation would disregard the manner in which the Tribes and the state have structured their jurisdictional relationship.
>
> . . . . . .
>
> [T]he congressional intent in passing the 1968 amendment did not contemplate that a subsequent, retroactive application of a change in statutory interpretation could alter South Dakota's lack of jurisdiction existing at the time of the repeal of section 7.

900 F.2d at 1173, 1174. Accordingly, South Dakota does not have jurisdiction over Indian country, nor may the State exercise partial jurisdiction over highways running through the reservations.

[4] Since South Dakota had no jurisdiction on the reservation, our fresh pursuit statute could not reach onto the reservation and we are left with the question: What effect did Krone's incursion onto the reservation have on the trial of Spotted Horse?

[5] We first consider Spotted Horse's argument that the trial court lacked jurisdiction to try him on the charges. He acknowledges our holding in *State v. Winckler*, 260 N.W.2d 356 (S.D.1977), where we said:

> When a person accused of a crime is found within the territorial jurisdiction wherein he is so charged and is held under process legally issued from a court of that jurisdiction, neither the jurisdiction of the court nor the right to put him on trial for the offense charged is impaired by the manner in which he was brought from another jurisdiction, whether by kidnapping, illegal arrest, abduction, or irregular extradition proceedings.

Id. at 363 (citing 4 Wharton's Criminal Procedures § 1484, at 39–40 (1957)). This rule, the Ker–Frisbie rule, is an adaptation of

8. Act of April 11, 1968, Pub.L. 90-284, Title IV, § 403, 82 Stat. 79 (codified at 25 U.S.C. § 1323 (1983)).

the rules of *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886) and *Frisbie v. Collins*, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952), originally adopted by this court in an earlier decision, *State v. Thundershield*, 90 S.D. 391, 399, 242 N.W.2d 159, 163–64 (1976). Spotted Horse urges us to reexamine our holding in *Winckler* in light of the authority found in *United States v. Toscanino*, 500 F.2d 267 (2d Cir.1974).

In *Winckler* the offense charged, assault with a dangerous weapon without intent to kill, was committed by the Indian defendants firing guns from trust land at officers who were outside the trust land. The defendants surrendered to an officer of the B.I.A. police, who then simply turned them over to State authorities for prosecution. In comparison, the defendant in *Toscanino* alleged that he was kidnapped in Uruguay by American agents, tortured, and abducted to the United States for the purpose of prosecution here. The *Winckler* decision referred to our *Thundershield* decision and eschewed *Toscanino*. *Thundershield* involved an extradition technicality, a purely statutory violation, not claimed to be of constitutional dimension.

More recently we applied the same rule in *Quiver v. State*, 339 N.W.2d 303, 305 (S.D.1983), referring to it as the *Ker* rule. In *Quiver*, no Indian jurisdiction was involved; rather it was a question of procedurally incorrect extradition from Nebraska.

In the context of Indian jurisdiction cases, the rule found in *Ker* and *Frisbie* was criticized by the New Mexico Supreme Court in *Benally v. Marcum*, 89 N.M. 463, 553 P.2d 1270 (1976). Citing *Toscanino*, the decision first noted the expansion of the concept of due process to protect the accused against pretrial illegality. The decision went on to point out how the Navajo tribe "has provided specific procedures for extraditing persons accused of crime from the reservation" and the Navajo tribal government's exercise of the sovereign power vested in them. 89 N.M. at 467, 553 P.2d at 1274.

Although we find Spotted Horse's case can be factually distinguished from *Thundershield*, *Winckler* and *Quiver*, and it is a very close case based on the actions of the police officer, we are not persuaded to abandon our rule at this time. Even though Krone chased defendant at breakneck speeds which were unwarranted considering the nature of the violation (expired license plate stickers), and engaged in a battle using his night stick, his actions cannot be equated with torture. No doubt, in pursuing Spotted Horse, Krone was relying, to some degree, on our decision in *Onihan*. Further, because the record reflects that the Standing Rock Sioux Tribe has not enacted into their tribal code any provisions for extradition, we are left with the firm conviction that, at least for the present, we should retain our established rule. Thus, we hold that the trial court had jurisdiction over Spotted Horse for the purpose of trial.

In arriving at this decision, we are also aware of the discussion in *Toscanino*, *supra*, wherein the court discussed the development of the concept of due process "which now protects the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part." 500 F.2d at 275. The court went on to point out:

> Although the issue in most of the cases forming part of this evolutionary process was whether evidence should have been excluded (e.g., *Mapp*, *Miranda*, *Wong Sun*, *Silverman*), it was unnecessary in those cases to invoke any other sanction to insure that an ultimate conviction would not rest on governmental illegality.

Id.

[6, 7] We then examine the correlative issue, whether the evidence, particularly the field sobriety test and the blood test results, resulting from Spotted Horse's arrest were admissible at trial. Although Spotted Horse raises no issue on the admissibility of the field sobriety tests, and only challenges the admission of the blood tests on statutory grounds regarding the drawing of the blood sample, we review this very important issue under the doctrine of

plain error. SDCL 23A–44–15. Under the doctrine of *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the exclusionary rule generally makes inadmissible against the defendant evidence that is the product of an unconstitutional arrest. As the court explained in *Wong Sun*, the purpose of the rule is to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person. The exclusionary prohibition extends to indirect as well as direct evidence; physical tangible materials obtained either during or as a direct result of an unlawful invasion, come at by exploitation of the illegal search; and testimony of matters observed during an unlawful invasion to enforce the basic constitutional policies. The seizure of Spotted Horse by Krone was clearly a violation of Spotted Horse's Fourth Amendment rights, thus suppression would seem to be automatic. However, there are some jurisdictions which have made some distinctions whereby the admission of such evidence has been permitted.

In *People v. Wolf*, 635 P.2d 213 (Colo. 1981), the Denver police made a stakeout and arrest in an adjoining county, beyond their jurisdiction, collected evidence, and turned the case over to the local authorities for prosecution. The Colorado Supreme Court determined that the police had the power to make a citizen's arrest where probable cause existed. The court went on, however, to caution that in cases where the police act in willful disobedience of the law, the courts have not hesitated to use their supervisory powers to exclude evidence. *Id.* at 217.

Here, Krone was not in the process of making a citizen's arrest, assuming such an arrest is possible under tribal ordinances. The violation for which he was initially and principally making the arrest, failure to display current vehicle registration, was not even an offense triable on the reservation. With respect to the DUI offense, Krone did not follow proper procedures. He transported Spotted Horse back to Walworth County for trial rather than turn him over to tribal authorities. Likewise, in *City of Kettering v. Hollen*, 64 Ohio St.2d 232, 416 N.E.2d 598 (1980), the Ohio Supreme Court, in a rather shallow opinion, determined that the exclusionary rule was not applicable to a DUI defendant arrested by a Kettering police officer in adjoining Dayton. The officer was engaged in hot pursuit. Nevertheless, the court assumed from an insufficient record that the arrest was unauthorized. The court held that the exclusionary rule, applicable for violations of a constitutional nature only, would not be applied to evidence which is the product of police conduct violative of *state law*, but not violative of constitutional rights. *Id.* 416 N.E.2d at 600. Because we view Krone's actions in pursuing Spotted Horse down the reservation highway, into the housing area and onto his front lawn to be a constitutional violation, far above simple statutory violations, we hold that the evidence attained by the unconstitutional arrest is not admissible against Spotted Horse. We therefore reverse the conviction for driving under the influence.

[8] However, since the failure to display current registration offense was committed off the reservation, and independent evidence was obtained through Krone's observation before the illegal arrest, we affirm the verdict on this offense. *Winckler, supra* (manner of arrest, even including illegal arrest on reservation, does not bar prosecution).

That issue decided, we feel compelled to comment on the need for a solution to this gap in criminal jurisdiction. When a crime is committed off the reservation and criminals can flee unimpeded onto the reservation, both Indians and non-Indians alike are harmed. We would hope that in this year which the Governor has proclaimed "The Year of Reconciliation," that both tribal leaders and governmental officials will sit down and work out treaties that will remedy this situation.

2. Suppression of Evidence

Next, because Spotted Horse's conviction on expired license plates is preserved, we consider his argument that Krone's use of excessive force in making the arrest was a

violation of SDCL 23A-3-5[9] and required suppression of evidence on *all* charges or, in the alternative, a jury instruction providing that an illegal arrest provided a defense to *all* the charges.

[9] Before we may reverse the trial court on a motion to suppress, Spotted Horse must demonstrate that the trial court abused its discretion in not suppressing the evidence. *State v. Bartlett*, 411 N.W.2d 411, 414 (S.D.1987). Spotted Horse fails to meet this burden.

[10] We begin by noting that there is a paucity of evidence that supports Spotted Horse's contention that he was brutally beaten. Also, Spotted Horse conveniently does not mention his resistance in leaving his car. Faced with this dearth of evidence, the trial court did not abuse its discretion in refusing to give the instruction or suppressing the evidence. *Bartlett, supra.* Furthermore, we can find no precedent for an exclusionary rule that would extend suppression of evidence to *unrelated* offenses and the cases cited by Spotted Horse certainly do not warrant this conclusion.

Contrary to Spotted Horse's contention, *State v. Gage*, 302 N.W.2d 793 (S.D.1981), merely stands for the proposition that insufficient information in an affidavit for a warrant deprived the police of probable cause and thereby makes an arrest illegal. As we noted earlier, even though the arrest on the reservation was illegal, that does not prevent prosecution on the failure to display current registration sticker offense. *Winckler, supra.*

Nor does *Brown v. Wyman*, 224 Mich. 360, 195 N.W. 52 (1923), stand for the proposition that excessive force invalidates an arrest. *Brown* is a civil case that awarded civil damages to a plaintiff who was struck in the face with a black jack by a sheriff making an arrest. Instead of supporting Spotted Horse's argument, *Brown* points to Spotted Horse's proper remedy—a civil suit for damages, not application of the exclusionary rule.

Nor is *State v. Rich*, 417 N.W.2d 868 (S.D.1988), support for creation of a new exclusionary rule. *Rich* involved an assault by a private citizen and the availability to the defendant of the privilege of self-defense or defense of another. Nothing within the decision supports this novel expansion of the exclusionary rule that Spotted Horse now urges.

Finally, contrary to Spotted Horse's argument, *United States ex rel. Means v. Solem*, 646 F.2d 322 (8th Cir.1980), stands only for the proposition that a defendant may be entitled to a self-defense instruction or defense of others in a riot situation if excessive force is used. It does not stand for, nor can we find, any precedent that states that a defendant is entitled to an acquittal on *unrelated* charges if excessive force is used during an arrest. Sufficient deterrence to police misconduct is provided if the excessive force invalidates a resisting arrest charge. Further, Spotted Horse would be entitled to pursue civil remedies against the officer. These two factors together provide a more than sufficient remedy for this type of conduct.

Because we have suppressed the blood test as the fruits of an illegal arrest, Spotted Horse's third issue is moot.

DECISION

Therefore, we reverse the trial court on the conviction for DUI and affirm on the conviction for failure to display current registration and instruct the trial court to enter an order in conformity with this opinion.

MILLER, C.J., and WUEST and SABERS, JJ., concur.

HENDERSON, J., concurs specially.

HENDERSON, Justice (specially concurring).

As one reads through the thread of the majority opinion, it becomes obvious that this Court, and thus this State, is enlightening itself by (a) having its decisions re-

9. SDCL 23A-3-5 provides, in pertinent part: "No person shall subject an arrested person to more physical restraint than is reasonably necessary to effect the arrest[.]"

versed and (b) finally recognizing that there is a tribal sovereignty concept which spreads across the reservations, not only in South Dakota, but across this nation.

To have condoned this officer's jurisdiction, on a private driveway, where the defendant was arrested, would be granting authority unto law enforcement officers in this state defying the recognition of tribal sovereignty and independence. Such recognition would simply cause the mandates of Public Law 280 to be a nullity. Therefore, I concur in the majority's holding reversing the DUI conviction.

As I concur in this opinion, I call attention to my special concurrence in *State v. Onihan*, 427 N.W.2d 365 (S.D.1988):

> As one continues to struggle in reading the law, it is perceived that gradations of jurisdiction exist, not to mention variances, as the type of Indian jurisdiction cases surface in the appellate bodies. Specifically, in this type of case, basic questions should be asked: Does this case involve tort law? Family law? Criminal law? If the latter, does the case pertain to one of the major crimes? *See* 18 U.S.C. § 1153. Or are we just considering a minor crime? An analysis must further encompass the specific situs of the facts giving rise to the litigation. One must consider: Are the parties Indian or non-Indian? Does the Indian Child Welfare Act apply? Two authors, Davis H. Getches and Charles F. Wilkinson, in their treatise, Federal Indian Law (2d ed. 1986), write that the jurisdictional maze in criminal cases can be "walked with some confidence" when an analytical approach is followed. *Supra*, at 412. Briefly, their analysis contains these steps:
>
> 1. Was the locus of the crime in Indian Country?
> 2. Does Public Law 280 or a specific jurisdictional statute apply? Here, Public Law 280 is governing.
> 3. Was the crime committed by or against an Indian?
> 4. Which Defendant–Victim category applies? This question includes "victimless" and "consensual" crimes.
>
> *See Federal Indian Law, supra*, at 412–15.
>
> This point I try to make: Jurisdiction depends upon many factors. History of the particular reservation involved,[1] as well as legislative enactments of the particular state, likewise play a vital role. Each case must be scrutinized to determine where jurisdiction lies. Indian jurisdiction is a complex subject and is not ordinarily amenable to black and white solutions. There are many areas of gray in this kind of litigation. Overlaying all of the above is the shifting sand of federal policy which spawns further complicated and knotty difficulties and entanglements. One law review article has characterized Indian policy as having "vacillated between assimilation, annihilation, and self-determination." Note, Recognition of Tribal Decisions in State Courts, 37 Stan.L.Rev. 1397, 1399 (1985).

I wish to further call attention to my concurring in result in *Wells v. Wells*, 451 N.W.2d 402 (S.D.1990).

> As I pen my legal thoughts, a wave of legal concern comes upon my spirit. For over one decade, I have attempted to recognize the Indian community's struggle for social and governmental autonomy, as well as justice for our Red Brothers in this State's courts. *State v. Chief Eagle*, 377 N.W.2d 141 (S.D.1985), Henderson, J., dissenting. Comity and mutual respect to the decisions of tribal courts has been a long time message of mine. *Mexican.* I have in the past, and now, recognize that in South Dakota we

1. South Dakota has nine Indian Reservations, and each has an active tribal court. Seven have tribal courts which originate in a tribal sovereignty predating the United States Constitution. Two tribal courts are derived from the federally created Courts of Indian Offenses. These tribal courts are all subject to Congressional authority. *See generally* F. Pommersheim, South Dakota Tribal Court Handbook (March 1988). The Sisseton-Wahpeton Sioux Reservation, formerly the Lake Traverse Indian Reservation, was technically terminated as a "reservation" in 1891, but retains some attributes of reservation status. *See DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).

have tribal and state court systems. As found in the 1990 Legislative Senate Journal (pg. 60, 2nd legislative day), our present Governor has declared this year to be a Year of Reconciliation, requesting Indians and non-Indians to come closer together. Our Governor has asked us to set goals, to make strides toward better understanding in 1990. He is quoted in an article on page 2 of the Rapid City Journal, January 12, 1990 as follows: "The end result should not only be fun, but mutual respect and trust." Chairperson, Judy Petersen, who acts as the "Chairman" of the Flandreau Sioux Tribe, observed that the gathering should go beyond pure enjoyment. Governor Mickelson thus appeared before the State Indian Affairs Commission on January 11, 1990 in an attempt to bring together the Indian and white community in a spirit of friendship. *Id.* pg. 1.

On February 1, 1990, Governor Mickelson and representatives of eight of the state's nine Sioux Tribes began what has now been called the "Year of Reconciliation." The Governor sat cross-legged on the floor or our State Capitol rotunda and shared a peace pipe with these Sioux representatives. Filled with legislators, state and tribal officials, the rotunda rang out with traditional Indian songs honoring the Indian people and expressing a hope for peace. *See,* Rapid City Journal, pg. 1, February 2, 1990.

This is the beginning of the second century of South Dakota statehood. It is good that Indians and whites now seek a year of racial understanding and a new beginning of peace with one another.

Alas, but hopefully only for a moment, as the tide of understanding ebbs and flows, South Dakotans read, via a February 8, 1990, Rapid City Journal article that our Governor has said: "We're not going to solve jurisdictional issues." He also expressed that jurisdictional disputes could not be settled by the State and tribes and should not be part of the 1990 Reconciliation effort. Disappointment was expressed by the Chairman of the Cheyenne River Sioux Tribe who observed that the gatherings should go beyond pure enjoyment thereof indicating that: "If he's (the Governor) not interested in jurisdictional things and the issues that are really tearing us apart, there is no sense trying to pull this thing together. It's rhetoric." However, other tribal leaders took a more positive approach after the reconciliation ceremony. Increased understanding by the non-Indians and Indians could bring about help and economic development, health care and education for Indian people, they asserted.

A deep wound exists in the State of South Dakota by virtue of jurisdictional disputes between tribal courts and state courts.[2] The Indians tell us that their inherent sovereignty pre-dates the Constitution of the United States. They want to decide cases, within tribal courts, which involve their people and their children. State court actions which undermine the authority of tribal courts are an impermissible infringement upon the right of tribal self-government. *Williams v. Lee,* 358 U.S. 217, 223, 79 S.Ct. 269, 272 [3 L.Ed.2d 251]. Let us, in the Year of Reconciliation, pursue all avenues of peace to included open-minded solutions to jurisdictional conflict between the Indians and non-Indians of this state.

I wrote specially in *Wells* because I was concerned with the sovereignty of tribal courts. In *Wells,* I called attention to a shining example of how this Court recognized the rights of Native Americans to care for and watch over and protect their own children in their own courts. *In re Guardianship of D.L.L. & C.L.L.,* 291 N.W.2d 278 (S.D.1980). In that special writing, I quoted Federal Judge Bogue as expressing in *Cheyenne River Sioux Tribe v. Kleppe,* 424 F.Supp. 448 (D.S.D.1977):

> . . . All too often courts seem to pay little more than lip service to the right and power of Indian people to govern themselves.

2. This Spotted Horse decision is a tender leaf of hope; let us pray that it blossoms.

Again, in *Wells*, I admonished that Native American people should have jurisdiction over disputes between their own people on their reservations. I quote from my writing:

> If state court jurisdiction on Indians or activities on Indian land would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law. The United States Supreme Court in *Iowa Mutual Ins. Co. v. LaPlante et al.*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987) declared, inter alia, 'We have repeatedly recognized the Federal Government's long standing policy of encouraging tribal self-government ... Tribal courts play a vital role in tribal self-government (citation omitted), and the Federal Government has consistently encouraged their development.

Further, in *Wells*, I stated:

> Land within the limits of any Indian Reservation under jurisdiction of the United States Government is in Indian country. 18 U.S.C. § 1151.

I now note, come the dawn, that the majority opinion now expresses: "Accordingly, South Dakota does not have jurisdiction over Indian country nor may the state exercise partial jurisdiction over highways running through the reservations."

In *Wells*, I stated:

> South Dakota has long danced with Public Law 280. It has unsuccessfully attempted to conditionally or partially assume civil and criminal jurisdiction over Indians and Indian territory. *See, In re High Pine*, [78 S.D. 121] 99 N.W.2d 38 (S.D.1959). Said decision overruled Chapter 391 of the Session Laws of 1957 which gave South Dakota criminal and civil jurisdiction over Indian land. Another key decision in this Court is *In re Hankin's Petition*, [80 S.D. 435] 125 N.W.2d 839 (S.D.1964). In *Hankin*, chapter 464 of the Session Laws of 1961 was ruled inconsistent with the congressional purposes of Public Law 280. There has been a historic struggle by the State Legislature with the Congress of the United States to acquire, in one fashion or the other, state jurisdiction to supplant inherent tribal sovereignty. In the end, the Crow Creek Tribe has a right to make and enforce its own laws subject only to the will of Congress. The members of this Court cannot manifest a power, by broad language, to carte blanche assume jurisdiction over controversies between the Indians exclusively arising within the borders of their own reservation. Hearken unto the words of a unanimous United States Supreme Court decision, *United States v. Mazurie*, 419 U.S. 544, 556, 95 S.Ct. 710, 717, 42 L.Ed.2d 706 (1975), reversing a 1973 Tenth Circuit Court decision as found at 487 F.2d 14. Speaking through Justice Rehnquist the highest court of this land stated:

> > This Court has recognized limits on the authority of Congress to delegate its legislative power ... Those limitations are, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter ... Thus, it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, they are a 'separate people,' possessing 'the power of regulating their internal and social relations ...'

Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

I wish to point out that this arrest was a reckless arrest and did not justify a 109 mile per hour pursuit, all mind you, arising from an invalid license plate sticker, a class two misdemeanor. This Native American defendant was arrested some 7 to 8 miles within the reservation, on a private driveway (his own). This area was expressly outside the scope of the jurisdictional mandate of SDCL 1-1-21 and SDCL 31-1-1. No action has ever been taken to acquire jurisdiction over a privately owned driveway and yard some 8 miles within the territorial boundary of an Indian Reservation in South Dakota. There are no federal statutes currently authorizing fresh pursuit by state officers onto an Indian Reser-

vation. True, the primary concern of Congress in enacting Public Law 280 was to deal with the problem of lawlessness and the absence of adequate law enforcement on certain reservations. *See, Rosebud Sioux Tribe v. South Dakota*, 709 F.Supp. at 1511. This does not, however, absolve the State of South Dakota from meeting the requirements imposed by federal law to attain such goals.

In *Benally v. Marcum*, 89 N.M. 463, 466, 553 P.2d 1270, 1273 (1976), the New Mexico Supreme Court held that state courts could not try Native Americans who are arrested on a reservation for an off-reservation crime. Perhaps that is good authority for reversing the invalid license plate sticker conviction. However, this Court's analysis is based upon *Winckler*, a contrary viewpoint. So we are standing upon 1977 precedent. Is that precedent sound? Is it sound when one considers the more recent decisions in the federal courts? I full well understand that the majority opinion believes the offense was committed off the reservation and the officer could see the plates. Hence, though an illegal arrest, we can, so the majority says, affirm the verdict on this offense. An arrest such as this should also be the subject of future efforts between Native Americans and the white legal community. It could well be that this arrest is another "gap in criminal jurisdiction." Certainly, this type of scenario is no novelty in South Dakota.

Accordingly, I now welcome the other four members of this Court to my views on reconciliation, *including jurisdiction*, so that Native Americans and the white community can gather in the spirit of giving and understanding which would trigger the elimination of prosecutorial clouds. In the immortal words of Isaiah "Come, let us reason together."

STATE of South Dakota, Plaintiff and Appellant,

v.

Michael K. OLSEN, Defendant and Appellee.

No. 16885.

Supreme Court of South Dakota.

Argued May 22, 1990.

Decided Oct. 10, 1990.

Driver of farm tractor was charged with second-degree manslaughter as result of traffic accident. The Magistrate's Court, First Judicial Circuit, Union County, David C. Humphrey, Magistrate, dismissed charge at preliminary hearing for lack of probable cause. State appealed. The Supreme Court, Sabers, J., held that dismissal charge was proper where State failed to introduce evidence that driver's failure to yield right-of-way to oncoming driver rose above level of negligence and was done in manner to suggest reckless disregard for safety of others.

Affirmed.

Henderson, J., concurred with writing.

Wuest, J., concurred specially with writing.

Miller, C.J., concurred in result.

1. Criminal Law ⇐1148

Magistrate's determination regarding probable cause at preliminary hearing is not to be disturbed upon review unless clear abuse of discretion is demonstrated. SDCL 23A-4-7.

2. Homicide ⇐74

In order for defendant's conduct to be deemed "reckless," for purposes of charge of manslaughter in second degree, defendant must consciously disregard substantial risk; defendant cannot be deemed reckless if he is unaware of risk his behavior creates. SDCL 22-1-2(1)(d), 22-16-20.

See publication Words and Phrases for other judicial constructions and definitions.

(3)

NO. 90-1003

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF SOUTH DAKOTA,

Petitioner,

v.

PETER SPOTTED HORSE, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK BARNETT
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
Counsel of Record

John P. Guhin
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215

EDITOR'S NOTE:

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IN THE

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STATE OF SOUTH DAKOTA,

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PETER SPOTTED HORSE, JR.,

Respondent.

INTRODUCTION AND STATEMENT OF CASE

The Respondent, in his Opposition to Petition for Writ of Certiorari, unaccountably asserts that the decision in this case affects no other state but South Dakota. In fact, the decision puts at issue not only South Dakota's pre-1968 assumption of partial jurisdiction, but also that of Arizona, Montana and Iowa. See, Petition for Writ of Certiorari, pages 16-17. In each of

these states, as in South Dakota, partial jurisdiction was assumed but the State did not simultaneously offer to take total jurisdiction.[1] Respondent offers no rebuttal to this analysis of the State, but only a mere denial.

---

[1]South Dakota, in 1957, just four years before the 1961 legislation in question, offered to take total jurisdiction. The first condition was that the tribe consent, either actually or constructively to the assumption of jurisdiction. Each of the tribes involved in the companion case to this case, South Dakota v. Rosebud Sioux Tribe, No. 90-749 (Petition for Certiorari pending) refused to give consent. This fact makes the argument regarding the necessity for a simultaneous offer to the tribes to take total jurisdiction highly mechanistic; moreover, it is worth noting that none of the tribes in the Rosebud litigation evidenced any desire for total state jurisdiction. (The second condition of the 1957 legislation, relating to county arrangement for reimbursement with the federal government, see SDCL 1-1-14, was apparently not confronted.)

RESPONDENT HAS NOT STATED SUFFICIENT REASONS FOR DENYING THE WRIT

I

THE RESPONDENT MISCONSTRUES THE SITUATION ON THE ROADS FROM 1964 THROUGH THE PRESENT.

A. Effectiveness of law enforcement arrangements.

South Dakota assumed jurisdiction over roads through Indian Country in 1961. See 1961 S.D. Sess. Laws 464. In 1964, as set out in more detail in the State's Petition for Writ of Certiorari, the South Dakota Supreme Court determined that the State could not assume jurisdiction over highways only; the court held that if any jurisdiction was assumed under Pub.L. 280, 67 Stat. 588, codified in part at 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (1953), all jurisdiction must be assumed as a matter of federal law. See In re Hankins, 125 N.W.2d 839 (S.D. 1964). This decision was proven to be erroneous by the decision of this Court in Washington v.

Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979). After Yakima was decided, the state began urging the courts to overturn the earlier state court decision so as to be consistent with Yakima. In State v. Onihan, 427 N.W.2d 865 (S.D. 1988) the state court did ultimately follow Yakima.

Respondent now argues to this Court that, from the period of 1964 to 1988, there was effective law enforcement on reservation highways despite the reliance on Hankins. This follows, in Respondent's argument, by virtue of a 1964 staff report of the South Dakota Legislative Research Council reciting the agreements which apparently then existed between the Tribal Councils, the United States Bureau of Indian Affairs, and the Attorney General. Respondent argues that because of these agreements highway law enforcement was effective from 1964 to 1988.

It was not. In the litigation in the companion case entitled, South Dakota v. Rosebud Sioux Tribe, No. 90-749, Petition for Certiorari filed November 5, 1990, South Dakota demonstrated that the fatality rate on reservation highways far exceeded that of the remainder of the state. The state-wide annual fatality rate for the ten-year period from 1977 through 1986 was 2.98 per 100 million miles traveled. In contrast, the 10-year annual fatality rate of the four reservation counties studied was 10.25 for Todd County on the Rosebud Reservation, 8.02 for Dewey County on the Cheyenne River Reservation, 7.02 for Ziebach County on the Cheyenne River Reservation and 17.01 for Shannon County on the Oglala Sioux Reservation. Affidavit of Pat Winters, dated January 6, 1988, in South Dakota v. Rosebud Sioux Tribe, No. 90-749, Petition for Certiorari filed November 5, 1990.

Standing Rock entered the Rosebud litigation at a late stage and the state did not develop any statistics relating to that reservation; it is telling that the Tribe did not do so. The claim of "effectiveness" of 1964-1988 law enforcement arrangements is not supported by the record.

B. Receptiveness to Agreements.

Moreover, it is disturbing that the Respondent should imply that South Dakota is hostile to agreements with Tribes. After the Eighth Circuit Court of Appeals rendered its opinion in Rosebud, South Dakota offered an agreement to the Rosebud plaintiffs.[2] The Standing Rock Sioux Tribe (and two other Tribes) declined to enter such an agreement.[3]

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[2]This incident arose on the Standing Rock Sioux Reservation.

[3]Because only one Tribe could agree with
(Footnote Continued)

C. Position of the United States.

Finally, the Respondent implies, through citation of the actions of the Bureau of Indian Affairs, that the United States favors his position. The contrary appears to be true. In Woehl v. United States, the United States, in its brief in the Court of Appeals for the Eighth Circuit, stated that South Dakota did assume jurisdiction over roads on the reservation, that its assumption of jurisdiction was immediately effective, and that it was "unaffected by subsequent South Dakota legislation, by the 1963 referendum, and by the Indian Civil Rights Act of 1968. It has never been removed by Congress." Brief of United States in Woehl v. United States, No. 87-5386SD, (8th Cir., filed

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(Footnote Continued)
the Rosebud settlement proposal, and three could not, the state determined to proceed with the Rosebud litigation.

Dec. 21, 1988), at 21. The United States said further that Yakima and Onihan left "no doubt that South Dakota's limited assumption of jurisdiction over criminal and civil matters arising on highways on Indian reservations was valid in 1961 and has remained so ever since." Id. at 21-22.[4]

II

RESPONDENT'S ARGUMENTS IN RELATION TO THE "RETROACTIVITY" LANGUAGE OF ROSEBUD AND IN RELATION TO THE PURPOSES OF PUB.L. 280 ARE NOT HELPFUL.

In Respondent's brief, pages 4-6, Respondent makes a concerted effort to direct this Court's attention away from the finding of the Eighth Circuit refusing to give retroactive application to Washington v. Yakima Indian Nation, 439 U.S. 463 (1979).

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[4]This action was settled before argument and no circuit court opinion was issued in Woehl.

The State's reply, of course, is that the Eighth Circuit did, in fact unjustifiably refuse to give such application to Yakima. Moreover, the result of the refusal is that federal Pub.L. 280 law may be permanently different in Washington state (the locus of the Yakima decision) and in South Dakota (the locus of the present case). Under Respondent's analysis, partial jurisdiction is permissible, as a matter of federal Pub. L. 280 law, in Washington State but is not permissible, as a matter of federal Pub. L. 280 law, in South Dakota.

Respondent also urges that an alleged shift in national policy towards Indian Tribes should be decisive. The State responds that the language of Pub. L. 280 and not an amorphous, malleable "national policy" should control the meaning of Pub.L. 280 as enacted in 1953. Thus, South Dakota has urged that its assumption of jurisdiction

in 1961 pursuant to Pub. L. 280 met the concerns motivating the 1953 passage of Pub. L. 280, as outlined in Yakima, 439 U.S. at 498. Assumption of exclusive jurisdiction would reduce the economic burden of federal jurisdiction by eliminating it and by eliminating the very substantial federal subsidy (an estimated $850,000 annually for three of four Rosebud plaintiffs) for ineffective tribal highway law enforcement. Second, South Dakota's assumption of jurisdiction responded to the hiatus in law enforcement on reservations--a hiatus which is not merely perceived but is a cruel reality on the reservation highways as outlined above. Third, South Dakota's assumption of jurisdiction begins to assimilate Indians into the general population. Respondent has not argued that South Dakota's efforts do not satisfy this requirement of Yakima. Because South Dakota

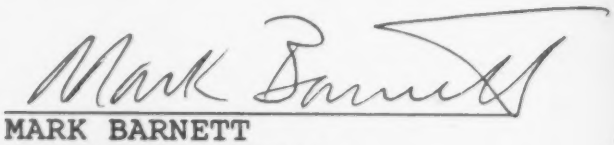
met the demands of Pub. L. 280 in 1961 it did assume jurisdiction over Indians on roads through Indian Country in South Dakota, despite any asserted shift in "national policy."

Finally, contrary to Respondent's assertion, the Indian Civil Rights Act of 1968 strengthens the State's claim to jurisdiction by explicitly preserving any "cession" of jurisdiction previously made. Act of April 11, 1968, 82 Stat. 73, 79 (codified at 25 U.S.C. § 1323(b)). Because South Dakota was a beneficiary of such a "cession" on July 1, 1961, and because South Dakota lacked the ability to surrender that cession at least until 1968, Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 886 (1986), South Dakota necessarily retained the 1961 "cession" of jurisdiction under the plain language of the 1968 Act.

CONCLUSION

The State of South Dakota respectfully requests that this Court grant a writ of certiorari to resolve the inconsistency between the Spotted Horse decision of the South Dakota Supreme Court and the decisions of this Court.

Respectfully submitted,



MARK BARNETT
ATTORNEY GENERAL
STATE OF SOUTH DAKOTA
Counsel of Record

John P. Guhin
Deputy Attorney General
500 East Capitol Avenue
Pierre, SD 57501-5070
Telephone: (605) 773-3215